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SHOW PROCEEDINGS AND ORDERS DATE: [04/28/89]

CASE NBR: [88100415] CS: STATUS: [ ]
SHORT TITLE: [Pueblo of Acuma]
VERSUS [Padilla, Frank] DATE DOCKETED: [083188]
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DATE	NOTE	PROCEEDINGS & ORDERS
Aug 31 1988		Petition for writ of certiorari filed.
Sep 29 1988		Order extending time to file response to petition until October 31, 1988.
Oct 27 1988		Brief amici curiae of All Indian Pueblo Council and Pueblo of Santo Domingo filed.
Oct 31 1988		Brief of respondent Frank Padilla in opposition filed.
Nov 8 1988		DISTRIBUTED. November 23, 1988
Mar 27 1989		REDISTRIBUTED. March 31, 1989
Apr 3 1989		REDISTRIBUTED. April 14, 1989
Apr 17 1989		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.) Justice Kennedy OUT.

PETITION FOR WRIT OF CERTIORARI

88-415

No. _____

In The

Supreme Court of the United States

October Term, 1988

PUEBLO OF ACOMA,

Petitioner,

v.

FRANK PADILLA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Whether state courts have authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity in a contract action claimed to arise out of the tribe's off-reservation business conduct.

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OPINIONS BELOW

The Opinion of the New Mexico Supreme Court was published in 754 P.2d 845 (N.M. 1988). A copy of that Opinion is printed as Appendix 1 to this Petition. The Order of the Court of first instance was not published; it is printed as Appendix 2.

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JURISDICTION OF THIS COURT

The New Mexico Supreme Court entered judgment on May 9, 1988. A Motion for Rehearing was timely filed. The New Mexico Supreme Court entered an Order denying the Motion for Rehearing on June 3, 1988. The Order is printed as Appendix 3.

This Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. § 1257 (3). The validity of a State law (N.M. Const. art.VI, § 13) conferring general jurisdiction on state courts is drawn into question on the ground that the sovereign immunity of a federally recognized Indian tribe is set up or claimed under the Constitution or Statutes of the United States.

—o—

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article VI. ("This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law

of the Land; and the Judges in every State shall be bound thereby'').

The following statutes are involved in the appeal:

Act of March 3, 1871, ch. 120, § 3, 16 Stat. 570, as amended, 25 U.S.C.A. § 81.

Indian Self-Determination Act of 1975, Pub.L. 93-638, 88 Stat. 2203, 25 U.S.C.A. §§ 450f(c), 450g(c) as amended, 450n.

Indian Reorganization Act, Act of June 18, 1934, ch. 576, §§ 16, 17, 48 Stat. 987, 25 U.S.C.A. §§ 476, 477.

Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 588, as amended (Pub.L. 280), 28 U.S.C.A. § 1360.

Act of June 30, 1834, ch. 161, § 17, 4 Stat. 731 (repealed in part 1859) 25 U.S.C.A. § 229.

STATEMENT OF THE CASE

Padilla filed suit in state court to collect on a written contract between himself and the Pueblo of Acoma, a federally recognized Indian tribe. The Contract was not reviewed or approved by the Secretary of the Interior. Services allegedly performed under the written contract took place on land owned by the Pueblo of Acoma which was not in reservation status, although the land is located next to the Acoma Indian Reservation. The Pueblo appeared specially and moved to dismiss on grounds of sovereign immunity.

At the hearing on the Motion to Dismiss, counsel for Mr. Padilla admitted to the Court that the contract was to be performed on land owned by the Pueblo in fee simple, which was not "reservation land." (Tr. 8, 20). The Court

of first instance subsequently issued an Order of Dismissal with Prejudice.

The Pueblo first raised the federal question in the New Mexico Supreme Court in Appellee's Answer Brief filed August 5, 1987, (Appellee's Br. at 3-7). The Opinion issued by that Court on May 9, 1988 clearly addresses the federal question. First holding that the suit had been brought against the Indian tribe itself, regardless of the fact that the Pueblo was doing business as an unincorporated association registered and authorized to do business in state of New Mexico; and holding that the tribe's sovereign immunity had not been waived by statute, contract, or otherwise; the court stated the issue as follows:

> The issue before us is whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct....
>
> The laws of the United States are the supreme law of the land, and judges in every state are bound thereby. U.S. Const. art. VI. We feel constrained, therefore, to answer the jurisdictional question in terms of whether the supreme law of the land has divested the courts of the State of New Mexico of the power and authority over an Indian tribe that has not waived sovereign immunity for off-reservation business conduct. Or, to put it in other words, has the supreme law of the land divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that asserts sovereign immunity for its off-reservation business conduct?

754 P.2d 845, 847 (N.M. 1988).

REASONS FOR GRANTING THE WRIT

In the state of New Mexico today, Indian tribal governments which conduct business outside the exterior boundaries of their reservations stand exposed to litigation and judgment in state court in a manner unknown to any other Indian tribes in the United States. For the New Mexico Supreme Court has decided that there is nothing in federal law or policy that prevents the state from exacting a heavy price for such conduct: if the tribal government wishes to do business in the state, it must largely forfeit its sovereign immunity. As a result of the opinion below, regardless of Congressional or tribal consent; regardless of where a contract is executed; and regardless of whether, as here, the contract has been performed on tribally-owned land; so long as the performance of the contract is alleged to occur outside the exterior boundaries of the tribe's reservation, the tribal government is subject to suit in state court.

On grounds not briefed or argued except on Petitioner Pueblo of Acoma's Motion for Rehearing, the court below has created a startling and massive exception in the heretofore unitary doctrine of Indian tribal sovereign immunity. Prior to this decision, Indian tribes throughout the United States have enjoyed a plenary sovereign immunity from suit in *all* courts of the land and for *all* of their activities wherever located, coextensive with that of the federal government. Until now, that long-standing public policy, derived from the federal government's relationship of protection with the tribes, has been without exception: "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized

Indian tribe." *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 172 (1977) (*Puyallup III*).

But the New Mexico Supreme Court, while conceding the force of the traditional doctrine for a tribe's on-reservation activities (and conceding Petitioner's status as a recognized Indian tribe and that no effective waiver or consent is present), has held the doctrine inapplicable to the tribe's off-reservation business conduct, even on tribally-owned land. With regard to such conduct, the court concludes, an Indian tribe possesses only the sovereign immunity enjoyed by the states, namely immunity from suit *in its own courts* without its consent; and consequently, under the principle of *Nevada v. Hall*, 440 U.S. 410 (1979), state courts may disregard the tribe's immunity as a matter of comity, in the interest of state policy.

The outcome below thus creates a bifurcated doctrine of tribal sovereign immunity, dependent upon where the cause of action against the tribal government arises. Within the exterior boundaries of its reservation, a tribe continues to possess complete, federal-like, immunity from suit in all courts; outside of the boundaries, however, the immunity is like that of the states. That result represents a construction of sovereign immunity utterly without precedent in American law. For every other sovereign, whether federal, state or foreign, the location of the events giving rise to the cause of action is irrelevant to the issue of immunity from suit. *See Nevada v. Hall*, 440 U.S. 410 (1979); *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *United States v. Sherwood*, 312 U.S. 584 (1941). In no instance, other than the opinion below, has immunity been dependent on where the sovereign has acted.

In one sense, the opinion below is in clear conflict with applicable decisions of this Court, federal courts of appeals, and another state court of last resort. In each of these tribunals, the defense of tribal sovereign immunity has been sustained regardless of where the events giving rise to the cause of action occurred. In another sense, however, the opinion below presents an important question of first impression regarding the extent and dimensions of tribal sovereign immunity. Although this Court has sustained the tribal sovereign immunity defense as to off-reservation activities, *Puyallup III*, the Court was not in that case, nor has it been, presented with a direct challenge to the defense based upon the location of the tribe's activities. It has apparently been assumed by this Court and other courts that the location of the activities giving rise to the cause of action was irrelevant to the sovereign immunity issue; however, because the assumption has never before been directly challenged, this Court has not had an opportunity to examine that assumption and thus to explicate more precisely the contours of tribal sovereign immunity.

Consequently, this case provides the Court with an opportunity to correct the anomaly in federal Indian law created by the New Mexico Supreme Court and thus to restore to the Indian tribes of New Mexico the sovereign immunity that they have historically possessed; and this case provides the opportunity for this Court to articulate in greater detail the nature of tribal sovereign immunity and thus to supply much needed guidance to courts below. The Court should grant this Petition for a Writ of Certiorari and vacate the New Mexico Supreme Court opinion.

I. The New Mexico Supreme Court, In Declining To Recognize The Sovereign Immunity Of The Pueblo Of Acoma In A Breach Of Contract Action Allegedly Arising Out Of The Pueblo's Off-Reservation Business Conduct On Tribally-Owned Land, Decides A Federal Question In A Way Which Conflicts With Applicable Decisions Of This Court, Federal Courts Of Appeals, And Another State Court Of Last Resort.

This Court specifically held that an Indian tribe retains its sovereign immunity for off-reservation activities in *Puyallup III*. The courts of the State of Washington entered an order against the tribe regulating tribal fishing rights both on- and *off-reservation*, and directing the tribe to identify the members engaged in fishing and to report the number of fish caught each week. Without making any distinction between the tribe's on-reservation and off-reservation activities, this Court held that the state court's entire order was invalid as applied to tribe, since it violated the tribe's sovereign immunity.

The application of tribal sovereign immunity to off-reservation activities in *Puyallup III* is thoroughly consistent with this Court's prior development of the doctrine. The view has long been that the dependent tribal sovereignties have been clothed as a matter of "public policy" with the immunity possessed by the dominant federal sovereignty, i.e., immunity from suit in any court for all of its activities. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). That broad view of tribal sovereign immunity apparently underlies Justice Brandeis' original formulation of the doctrine in *Turner v. United States*, 248 U.S. 354, 358 (1919): "without authorization from Congress, the [tribe] could not . . . have been

sued in any court." Likewise, that view explains why this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), in construing the nature of tribal sovereign immunity, relied for authority upon prior cases upholding the sovereign immunity of the *federal* government from suit in any court without its consent. Consequently, the New Mexico Supreme Court's creation of a bifurcated tribal sovereign immunity, quasi-federal or quasi-state depending upon where the cause of action arises, conflicts with applicable decisions of this Court recognizing as a matter of federal law and policy a unitary and complete immunity regardless of the situs of the cause of action.

Moreover, the opinion below conflicts with both the rationale and the holdings of the decisions of the federal courts of appeals. Those courts, in justifying the recognition of tribal sovereign immunity for on-reservation activity, have consistently employed the unitary and exhaustive formulation of that doctrine suggested by this Court, *e.g.*, "The Indian tribe's sovereign immunity is co-extensive with that of the United States," *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982). Although there the court had before it a case involving the tribe's on-reservation conduct, there is no suggestion, even implicitly, in *Ramey* or in any other federal court of appeals case that has considered the issue that the outcome would have been different had the tribe been engaged, as here, in business on tribally-owned land outside the exterior boundaries of the reservation. Indeed, given the geographically unlimited nature of federal immunity, a different result for off-reservation conduct would be utterly repugnant to the very use of the federal analogy. *See also, Jicarilla Apache Tribe v. Hodel*, 821

F.2d 537, 539 (10th Cir. 1987); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 771 (D.C. Cir. 1986); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd in part*, 474 U.S. 9 (1985); *State of California v. Quechan*, 595 F.2d 1153 (9th Cir. 1979); and F. Cohen, Handbook of Federal Indian Law at 324 (1982 ed.)

The unlimited, federal-like, nature of tribal immunity, absent effective waiver or consent, was most recently recognized in *State of Oklahoma ex rel. Oklahoma Tax Commission v. Graham*, 846 F.2d. 1258 (10th Cir. 1988) *(Graham II)*. The court held that because the named defendant was an Indian tribe, "a sovereign entity whose status is subject to and limited by Congressional power alone," and thus "subject to suit only under conditions prescribed by Congress," a well-pled complaint against the tribe must include an allegation of valid waiver or consent as a prerequisite to a state court's subject matter jurisdiction. *Id.* at 1260. Further, the court was thoroughly unconcerned with the status of the land where the cause of action arose. There is mention that the tribe owned the motel in the city of Sulfer, where the tobacco sales and bingo games that the state sought to regulate occurred, *State of Oklahoma ex rel. Oklahoma Tax Commission v. Graham*, 822 F.2d. 951 (10th Cir.), *vacated and remanded*, 108 S. Ct. 481 (1987) *(Graham I)*, and a reference to "the territory of the Chickasaw Nation," *Graham II*, 846 F.2d. at 1260, apparently implying that the court viewed the tribally-owned motel as such "territory." Neither opinion, however, contains any discussion of whether the motel was situated on trust or allotted land, or whether the land was or ever had been part of the Chickasaw Nation reservation.

Therefore, at a bare minimum, the position of the Tenth Circuit Court of Appeals is that at least so long as the cause of action arises, as here, on tribally-owned land, the tribe is immune from suit. Thus, the opinion below is in direct conflict with the governing law of New Mexico's own federal circuit court.

Other federal courts of appeals have taken the same expansive view of tribal sovereign immunity, consistently holding that Indian tribes retain their sovereign immunity even for conduct on land not owned by the tribe. *Every* other Circuit presented with these facts has reached the same conclusion. In *United States v. State of Oregon,* 657 F.2d 1009 (9th Cir. 1981), the court upheld an injunction against the Yakima tribe, prohibiting all tribal fishing of spring Chinook at both on-reservation and *off-reservation* fisheries, holding that the tribe's immunity had been waived by its intervention in the litigation. The court reached the waiver issue, however, only because it concluded that tribal immunity "from suit in state or federal court" applied to *all* of the tribal fisheries and that consequently a waiver was essential for state court jurisdiction. *Id.* at 1012-13.

Likewise in the Fifth Circuit, the court has held that an off-reservation bank which held tribal funds could successfully raise the tribe's sovereign immunity against a garnishment action. *Maryland Casualty Co. v. Citizens National Bank of West Hollywood,* 361 F.2d 517 (5th Cir.), *cert. denied,* 385 U.S. 918 (1966). And in the First Circuit, the court has held that sovereign immunity bars a suit by an attorney for fees against a tribe, even though the attorney contract with the tribe, located in Maine, involved exclusively services performed by the attorney off-reservation in Massachusetts. *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979). The court reasoned that because tribal sovereign immunity is a federally protected right even apart from any specific protective statute or treaty, its exercise is subject to no preconditions; a tribe is immune from suit whether or not it has been federally recognized, has a tribal land base, or even exists as a tribal government.

Finally, the state of Arizona, which has the most developed jurisprudence of any state court regarding tribal sovereign immunity for off-reservation activities, is completely in accord with the precedents of this Court and the federal courts of appeals. In *Morgan v. Colorado River Indian Tribe,* 443 P.2d 421 (Ariz. 1968), the court held that the tribe was immune from suit for the death of a swimmer at a tribally owned and operated marina located off-reservation. In the past twenty years, the application of the doctrine to off-reservation activities has remained intact, and has even been expanded by the Arizona courts to other varieties of causes of action, including breach of contract, arising off-reservation. *See, S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community,* 674 P.2d 1376 (Ariz. App. 1983), *rev. denied* (1984); *Dixon v. Picopa Construction Co.,* 755 P.2d 421 (Ariz. App. 1987), *petition for rev. granted* (June 21, 1988).

The precedent is clear and overwhelming that Indian tribes do not lose their sovereign immunity when they venture outside of reservation boundaries. Because the New Mexico Supreme Court opinion decides this federal question in a way which conflicts with the applicable decisions of this Court, the federal courts of appeals, and another state court of last resort, Certiorari should be granted to

resolve the conflict and to restore to the Indian tribes of New Mexico their federally protected rights of sovereign immunity.

II. Alternatively, The New Mexico Supreme Court, In Holding That Recognition Of The Sovereign Immunity Of The Pueblo Of Acoma In A Breach Of Contract Action Allegedly Arising Out Of The Pueblo's Off-Reservation Business Conduct On Tribally-owned Land Is Solely A Matter Of Comity And Is Constrained By No Federal Law, Decides An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The preceding cases have upheld the defense of tribal sovereign immunity, regardless of where the cause of action arose, without reference to or reliance upon any specific federal statute or statutory scheme pre-empting the exercise of state jurisdiction. Instead, this Court and others, describing the right either as a retained aspect of inherent tribal sovereignty or as a federally-conferred power, have located its source in "common law" rather than in any Congressional enactments. *Compare Martinez*, 436 U.S. at 58, *and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering P.C.*, 476 U.S. 877, 890 (1986). That "common law" right, without more, invariably has been found sufficient to confer a unified and comprehensive tribal immunity from suit, absent effective waiver or consent.

The New Mexico Supreme Court, however, has taken the position that the "common law" source of tribal sovereign immunity is limited to on-reservation conduct. Off-reservation, even on tribally-owned land, tribal governments submit themselves to the authority of state courts,

absent any "controlling law that divests the New Mexico courts of jurisdiction." (App. 1 at 9). The court below held that no such controlling law exists: "Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." (App. 1 at 10).

In the prior section of this Petition, it was argued that controlling case law does exist, requiring the state of New Mexico to recognize tribal sovereign immunity for the tribe's business conduct on tribally-owned land outside the exterior boundaries of the reservation. The New Mexico Supreme Court has apparently taken the view that (1) the case law is distinguishable, perhaps because the issue of tribal sovereign immunity for off-reservation conduct was never squarely presented and argued to those courts; and (2) no controlling federal statute pre-empts the exercise of state jurisdiction. Even if the court below were correct as to first contention, the second contention decides an important question of federal law which has not been, but should be, settled by this Court. The question is two-fold: (1) whether affirmative Congressional action is required at all to pre-empt state court jurisdiction over an Indian tribe that has not waived its sovereign immunity, for business conduct of the tribe on tribally-owned land outside the exterior boundaries of the reservation; and (2) even if so, whether Congressional law and policy do in fact pre-empt such state power.

A. The Opinion Below Conflicts With This Court's Recognition Of Long-Standing Federal Public Policy, Apart From Any Specific Governing Act Of Congress, Immunizing Tribal Governments From Suit In All State And Federal Courts.

The complete absence, in any decision of this Court, of any reliance upon affirmative Congressional action as a prerequisite to the recognition of tribal sovereign immunity, regardless of where the cause of action arose, is a clear indication that such immunity exists independently of specific Congressional authorization. The New Mexico Supreme Court, however, although distinguishing the case and relegating it to a footnote, (App. 1 at 12) has apparently been influenced by this Court's dicta in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973): "Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." For that is the rule that the court below has expressly applied to assess the extent of tribal sovereign immunity. (App. 1 at 9).

The court below is correct that *Jones* is distinguishable. As this Court noted, generalizations on the subject of state jurisdiction over Indian tribes "have become particularly treacherous." *Id.* at 148. The Court's opinion in *Jones* was carefully limited to the special area of taxation, and to the particular legal circumstances created by the Enabling Act for New Mexico which authorized the taxation upheld in that case. Further, the discussion in dicta of state regulation of *individual* Indians involves quite different considerations than the wholly distinct *tribal* right of sovereign immunity. Those considerations have

led this Court and others to define that tribal right, to locate its source, and to measure its breadth in the light of the dual concerns of inherent tribal sovereignty and of federal public policy. The way in which that has been done leaves no room for any requirement of express Congressional preemption of state jurisdiction.

Among the sovereign powers possessed by the tribes, as this Court has explained, are the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Sovereign immunity, of course, is one of those powers. *Martinez*, 436 U.S. at 58. The tribes could have "retained," however, only the degree of immunity which they already inherently possessed as pre-existing sovereigns. As this Court has explained, the nature of that right for any sovereign, absent expanded common law, Constitutional or statutory protection, is immunity from suit in the sovereign's *own* courts but subjection to suit in the courts of another sovereign under the discretionary principle of comity. *Verlinden B. V.*, 461 U.S. at 486-87. Because no court has ever, under any circumstances until the instant case, so limited tribal sovereign immunity, it follows that in addition to the "retained" right of immunity, Indian tribes also possess a much more expansive immunity that has been conferred on them and which renders them immune from suit, regardless of comity, in courts other than their own. *See Three Affiliated Tribes; Puyallup III; Martinez.*

The "expanded" immunity is a product of the unique relationship between the United States government and the Indian tribes that creates a duty to protect and foster tribal sovereignty as part of more general duties of protec-

tion undertaken by a stronger power in association with a weaker. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This Court has specifically recognized that the resulting federal policy, "which exempted the dependent as well as the dominant sovereignties from suit without consent," *United States Fidelity & Guaranty Co.*, 309 U.S. at 512, creates a tribal immunity in state court in excess of any retained sovereign right; and is sufficient alone, without further Congressional affirmation, to foreclose the exercise of state jurisdiction over Indian tribes. Repeatedly relying upon "public policy" apart from any Congressional enactment, *Id.* at 512-15, the Court concludes that affirmative action is required to override, rather than to create, the immunity: "[T]he suability of the United States and the Indian Nations, whether directly or by cross action depends upon affirmative statutory authority . . . Public policy forbids the suit unless consent is given." *Id.* at 514.[1] Consequently tribal sovereign immunity does have two components, as the court below seemed to recognize. Immunity from suit in its own courts is an inherent, retained right of pre-existing sovereignty; immunity from suit in the courts of other sovereigns, both federal and state, is an additional sovereign right, conferred by federal public policy.

The basis of that policy, however, clearly suggests that the court below is mistaken in viewing those two ele-

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[1] The resulting doctrine is comparable to the decisions of this Court in *Williams v. Lee*, 358 U.S. 217 (1959), and *Fisher v. District Court*, 424 U.S. 382 (1976), recognizing, on the basis of federal policy apart from any affirmative Congressional enactment, a tribal sovereignty right of exclusive subject matter jurisdiction in certain cases, well in excess of any pre-existing rights that the tribes could have possessed apart from their enlargement by federal policy.

ments of tribal sovereign immunity as bifurcated by geography, i.e., that the tribe possesses only the former for off-reservation activities, while enjoying the latter for its on-reservation activities. The rationale for the enlarged-immunity right has been most thoroughly explained by the federal court of appeals in *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895), and in similar language by the court in *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908), both of which are relied upon by this Court in *United States Fidelity & Guaranty Co.*, 309 U.S. at 512:

> "Being a domestic and dependent state, the United States may authorize suit to be brought against [the Choctaw Nation]. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction . . . As rich as the Choctaw nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. *The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms.*"

Thebo, 66 F. at 375-76 (emphasis added).

The court in *Thebo*, as in *Adams*, clearly contemplates that federal protection of tribal governmental and proprietary interests demands immunity from suit in *any* court for *all* causes of action; for the risk threatened by tribal liability in state court for off-reservation activities, absent consent or waiver based upon a careful and con-

sidered evaluation of that harm, is precisely the same as for on-reservation conduct, and is the very evil the public policy seeks to avoid. Further, the protection "does not stem from the treaty status of the [tribe], or a provision in an agreement granting [tribal members] rights of self-government, but rather it stems from the perceived "disastrous consequences" that would result from widespread exposure to civil suit. Thus, sovereign immunity . . . is a direct result of federal public policy." *Atkinson v. Haldane*, 569 P.2d 151, 159 (Alaska, 1977) (construing *Thebo* and *Adams*).

The massive exception to tribal sovereign immunity, and the resulting broad exposure to litigation and judgment, created by the New Mexico Supreme Court thus eviscerates the very policy basis for the immunity doctrine. Whether the policy retains its vitality and continues to justify plenary tribal sovereign immunity is a decision that is solely within the province of Congress. Certiorari should be granted to vacate the opinion of the New Mexico Supreme Court usurping that authority.

B. The Opinion Below Conflicts With The Congressional Protection Of Tribal Sovereign Immunity In The Act Of June 30, 1834; The Act Of March 3, 1871; The Indian Reorganization Act Of 1934; Public Law 280; The Indian Self-Determination Act Of 1975; And Other Federal Statutes.

Even if affirmative congressional action were required to preserve tribal sovereign immunity for off-reservation conduct, Congress has in fact so acted, consistently and definitively, for over 150 years. The result is a legislative

plan protecting tribal sovereign immunity that is so tailored, so detailed, and so comprehensive as to leave no room for the exception to that immunity proposed by the New Mexico Supreme Court. The price exacted from tribes by the state of New Mexico for doing business in the state—the forfeiture of their plenary immunity from suit—cannot be reconciled with the Congressional plan and is consequently foreclosed by it.

This Court has consistently recognized "Congress' jealous regard for Indian self-governance," and the importance of tribal sovereign immunity as "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. That "jealous regard," however, has not been limited solely to tribes acting within their reservation boundaries. With respect to tribal sovereign immunity specifically, Congressional protection has extended outside the reservation since 1834. *See* Act of June 30, 1834, ch. 161, § 17, 4 Stat. 731, (repealed in part 1859) 25 U.S.C.A. § 229. This "horsethief" statute allows actions against Indian tribes for injury to property by tribal members, whether within or outside of Indian country, only "under the direction of the President." The law bars all such claims against tribal assets without federal approval. Further, when Congress in the nineteenth century decided to open tribal assets to any other claims by outsiders, it did so on a careful and considered case-by-case basis. *See, e.g.*, Act of March 3, 1891, ch. 538, 26 Stat. 851.

Congress intensified its efforts to protect tribal assets from diminution with the Act of March 3, 1871, ch. 120, § 3,

16 Stat. 570, as amended, 25 U.S.C.A. § 81. The Act, intended to protect tribes from "improvident and unconscionable contracts," *In re Sanborn*, 148 U.S. 222, 227 (1893), imposed certain requirements on all contracts with Indian tribes or individual Indians that involved an expenditure of tribal funds, an impact on Indian lands, or a claim against the United States. Approval of such contracts by the Secretary of Interior was required, thereby interposing federal supervision before tribal assets could be contractually committed or tribal sovereign immunity waived. *See A. K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986).

In a later era, the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, empowered the Secretary of the Interior to approve tribal constitutions and by-laws (§ 16, 25 U.S.C.A. § 476) and issue charters of incorporation to Indian tribes (§ 17, 25 U.S.C.A. § 477). Under that Act, courts have scrupulously upheld tribal sovereign immunity to the extent that tribal constitutions, by-laws, or charters of incorporation did not explicitly waive the protection. *See e.g., Maryland Casualty Co. v. Citizens National Bank of West Hollywood.*

Congress' careful attention to tribal sovereign immunity was again demonstrated in the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, as amended, 28 U.S.C.A. § 1360, commonly known as Pub. L. 280. Although that Act allowed the extension of state court jurisdiction over tribal members in certain instances not applicable here, Congress did not, as this Court has explained, intend or provide any limitation upon the tribes' immunity from suit. Rather, the Act itself and its subsequent amendments demonstrate

"continuing Congressional concern over tribal sovereignty" and sovereign immunity. *Three Affiliated Tribes*, 476 U.S. at 892. Thus, even when Congress acted to confer upon state courts greater power over Indian matters, it kept protected and free from state jurisdiction the tribal government itself.

While the prior Acts did not specifically mention sovereign immunity for tribes, the Indian Self-Determination Act of 1975, Pub.L. 93-638, 88 Stat. 2203, 25 U.S.C.A. §§ 450a-450n, did. The Secretaries of Interior and Health and Human Services are authorized to require tribes wishing to contract with the federal government pursuant to the Act to obtain liability insurance; the insurance carrier must waive its right to assert the tribe's sovereign immunity as a defense, *but only to the extent of the policy limits.* 28 U.S.C. § 450f(c) and 25 U.S.C. § 450g(c). Further the Act concludes with Congressional affirmation of tribal sovereign immunity:

> Nothing in this Act shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe;

25 U.S.C. § 450n. The legislative history emphasizes that this language "protects the sovereign immunity of Indian tribes from suit." H. R. Rep. No. 1600, 93rd Cong., 2d Sess. reprinted in 1974 U.S. Code Cong. & Ad. News, 7775. The Department of Interior stated the language "provides desirable assurance that nothing in the Act alters tribal immunity from suit." *Id.* at 7793.

These recent congressional and executive statements upholding tribal sovereign immunity are unequivocal. The

distinction relied upon by the New Mexico Supreme Court is conspicuously absent. The only exception recognized under the law allows suit only under Secretarial supervision, and then only to the extent insurance coverage protects tribal assets. This tailored exposure to suit is harmonious with modern business practice and federal policy in the modern era where "both the Congress and Executive began to articulate a policy of Indian control and self-determination consistent with the maintenance of the federal trust responsibility and the unique Federal-Indian relationship." *Id.* at 7787. The carefully crafted protection of tribal sovereign immunity and balancing of interests in the contract context through the use of insurance thus provides "substance and credibility to the concept of Indian self-determination." *Id.* at 7782.

The exception to tribal sovereign immunity created by Congress in the Indian Self-Determination Act is thus thoroughly consistent with a long legislative history that conjoins diligent protection of that immunity with periodic, carefully limited modifications of it designed to accommodate changing national and tribal interests. It is impossible to read this history of Congressional effort and scrutiny against a background, as the court below suggest, of an immunity doctrine that exposes tribal assets to suit each time the tribal government ventures outside its reservation. Were that the case, all of Congress' delicate tailoring of protection for, and limited exposure of, those assets becomes largely inconsequential. The Court should take this opportunity to align the judiciary in support of plenary tribal sovereign immunity except as limited or waived by the tribes, Congress directly, or through Congress' authorization of the Executive to do so.

C. The Opinion Below Conflicts With The Decisions Of This Court Recognizing Overriding Tribal And Federal Interests In Tribal Sovereign Immunity, Tribal Self-Government, And Protection Of Tribal Funds And Property, That Outweigh Possible Competing State Interests.

The conclusion that the opinion below is inconsistent with clear and long-standing federal law and policy protecting tribal sovereign immunity is reinforced by a consideration of the tribal, federal and state interests at stake.

The federal and tribal interests in tribal sovereign immunity arise from the "disastrous consequences," *Adams,* 165 F. at 309, to tribal treasuries and governing power threatened by unprotected exposure to suit. This Court has recognized the integral connection between tribal governing ability and economic development, and the consequent importance that Congress has placed on protection of tribal progress toward self-sufficiency. Thus, "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 1093 (1987).

In addition to the shared tribal and federal interests, distinctly federal interests are also involved. It has long been recognized that the doctrine of *federal* sovereign immunity rests primarily on the principle that litigation must not be allowed to stop or slow down federal activities that are essential to governing the nation nor be allowed to

impose an unauthorized and unexpected drain on the public treasury. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *See* Wright, Miller, and Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3654 (1985). Exposure of Indian tribes to suit for their off-reservation business conduct directly implicates both of these concerns, and impedes Congress' ability to execute its responsibilities with regard to the tribes. First, Congress' unique obligation toward Indian tribes requires its protection of the tribal right of self-government. *Worcester v. Georgia; Morton v. Mancari*, 417 U.S. 535 (1974). Given the centrality of tribal sovereign immunity to tribal self-government, *Three Affiliated Tribes*, 476 U.S. at 890-91, any judicially-created exception to tribal sovereign immunity for off-reservation business conduct would necessarily impede the ability of Congress to carry out its protective obligation. Second, Congress as trustee of tribal funds and property has undertaken the protection of those assets from diminution, a commitment which is not contingent upon whether the diminution occurs on- or off-reservation, and which would likewise be seriously impeded by any judicially-created rule exposing tribes to suit for their off-reservation business conduct. Any diminution of tribal assets is likely to result in a decreased ability of the tribe to support itself and a corresponding call for greater expenditures from the public treasury for the support of the tribes. Consequently, so long as Congress remains the protector of tribal self-government and the trustee of tribal assets, state judiciaries must be foreclosed from reassessing, as a matter of state policy, the extent to which

protection of tribal sovereignty and tribal assets is required.

Counterpoised to the tribal and federal interests is the state interest in enforcing written contracts. That interest, however, can be served without the massive exception to tribal sovereign immunity created by the court below. Any individual or entity contracting with an Indian tribe may seek such a waiver of immunity; and moreover, any contractor or its counsel dealing with a sovereign entity reasonably should be on notice that sovereign immunity is a potential issue to be considered in the negotiation of the contract. Consequently, the state's interest is served equally well by a clear legal rule protecting such immunity in the off-reservation context, and recognizing that waiver of the immunity is subject to contract negotiation.

To the extent that the state seeks to protect its citizens who contract with Indian tribes in ignorance of their sovereign status, that goal conflicts with clear state policy enforcing the freedom of contract. *Smith v. Price's Creameries*, 650 P.2d 825 (N.M. 1982); *Rio Grande Jewelers v. Data General Corp.*, 689 P.2d 1269 (N.M. 1984). Further, even if that interest is granted, it can "be met only at an unacceptably high price to tribal sovereignty." *Three Affiliated Tribes*, 476 U.S. at 889. As in that case, the cost to the federal government and to the tribes that the state has sought to impose upon tribes who venture off-reservation is simply too high. The much lesser cost to the state of respecting the federal and tribal interests must simply be accepted. *Id.* at 893.

On balance, the state interest in enforcing written contracts is outweighed by federal policy supporting tribal self-government and economic development, federal statutes prohibiting unsanctioned claims against the tribe, and explicit, narrowly-tailored exceptions to otherwise unlimited sovereign immunity. Tribal interests in its governing ability and in generating revenue and employment for its members parallel federal interests. Since the state interest in contract enforcement is foreclosed by federal law and policy, the opinion of the New Mexico Supreme Court must be vacated.

—o—

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review and vacate the Judgment and the Opinion of the New Mexico Supreme Court.

Respectfully submitted this 31 day of August, 1988.

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APPENDIX 1

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

FRANK PADILLA,

Plaintiff-Appellant,

vs. No. 16,835

PUEBLO OF ACOMA, d/b/a SKY CITY CONTRACTORS, FILED MAY 9, 1988

Defendant-Appellee.

APPEAL FROM THE DISTRICT
COURT OF BERNALILLO COUNTY

Frederick M. Mowrer, District Judge

Grisham, Lawless & Earl
Richard V. Earl
Albuquerque, NM for Appellant

Ortega & Snead, P.A.
Michael D. Bustamante
Albuquerque, NM for Appellee

OPINION

RANSOM, Justice.

Frank Padilla, a roofing consultant, sued the Pueblo of Acoma d b/a Sky City Contractors for breach of contracts under which Padilla supervised Sky City's installation of roofs on two building projects located off the Acoma reservation. The Pueblo moved to dismiss the suit for lack of subject matter jurisdiction on the grounds of sovereign immunity. Following a hearing, the district

court granted the Pueblo's motion and dismissed the complaint. Padilla appeals. We reverse.

We initially address whether the Pueblo adequately raised lack of subject matter jurisdiction in its motion to dismiss under SCRA 1986, 1-012(B)(1). Padilla submits that, under *Aetna Casualty & Surety Co. v. Bendix Control Division*, 101 N.M. 235, 680 P.2d 616 (Ct.App.1984), a proper challenge of jurisdiction must contain something more than the bare allegations within the motion. *Id.* at 240, 680 P.2d at 621. Padilla argues that the Pueblo's failure either to verify or to accompany its motion with an affidavit or other sworn testimony requires this Court to accept as true Padilla's allegation that Sky City is an unincorporated association registered and authorized to do business in New Mexico and, by implication, not protected under the Pueblo's tribal immunity.

The focus in *Aetna* was limited, however, to factual allegations that would satisfy the "minimum contacts" due process requirements for personal jurisdiction over a nonresident defendant. There, the complaint alleged sufficient facts concerning the commission of a tortious act within the state. The allegations in the complaint had to be taken as true in the absence of affidavits or other testimony under oath supporting a motion asserting lack of personal jurisdiction. In this case, the jurisdictional attack is on the power and authority of the court to act when an Indian tribe asserts its sovereign immunity. The plaintiff's naming of the Pueblo of Acoma as the defendant, together with the long recognized policy of judicial notice of Pueblo Indian tribes, *United States v. Lucero*, 1 N.M. 422 (1869) established the factual basis

for the Pueblo's motion to dismiss on the grounds of sovereign immunity. No sworn testimony was necessary to establish that the defendant was indeed a Pueblo Indian tribe. We accept as true, and discuss later in this opinion, the allegation that the defendant Pueblo was doing business as an unincorporated association registered and authorized to do business in the state.

The issue before us is whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct. *See State v. Patten*, 41 N.M. 395, 69 P.2d 931 (1937) (three jurisdictional essentials are jurisdiction over parties, jurisdiction of subject matter, and power or authority to decide particular matters presented).[1]

The laws of the United States are the supreme law of the land, and judges in every state are bound thereby. U.S. Const. art. VI. We feel constrained, therefore, to answer the jurisdictional question in terms of whether the supreme law of the land has divested the courts of the State of New Mexico of the power and authority over an Indian tribe that has not waived sovereign immunity for off-reservation business conduct. Or, to put it in other words, has the supreme law of the land divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that asserts sovereign immunity for its off-reservation business conduct?

Where a tribe's sovereign immunity obtains, it is well settled and binding upon this Court that only under congressional consent or an effective waiver may a state court exercise jurisdiction over a recognized Indian tribe.

Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977). Furthermore, any waiver of tribal immunity from suit " 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). Tribal sovereignty is subject to plenary federal control and definition. Absent federal authorization, tribal immunity is privileged from diminution by the states. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 106 S.Ct. 2305, 2313 (1986).

Crucial to the concluding decisional portion of this opinion is the absence of any controlling case law specifically divesting state courts of jurisdiction over Indian tribes doing business outside of reservation boundaries as an unincorporated association registered and authorized to do business in the state. Before reaching the determinative issue in this case, however, we will consider other significant points raised and argued by the parties.

Padilla points to no federal legislation which would constitute congressional consent to sue the Pueblo of Acoma d/b/a Sky City Contractors for breach of contract. He does claim that NMSA 1978, Section 53-9-1 (Repl.Pamp. 1983), establishes that the Pueblo Indians may be sued as a corporation and be required to defend such suit in any court of law or equity. Padilla relies on the following statutory language:

> The inhabitants within the state of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico . . . shall

> be known in the law by the name of the Pueblo de . . ., (naming it), and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas and matters whatsoever, proper to recover, protect, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to said inhabitants, or to any individual.

The clause "sue and be sued" must be evaluated within the context of the statute and its history. The original enactment of Section 53-9-1 predates the 1848 treaty of Guadalupe Hildago which similarly protected title to Pueblo Indian lands. *See Treaty of Peace Between the United States and Mexico*, NMSA 1978 (Vol. 1 Pamp. 3); *United States v. Joseph*, 94 U.S. 614 (1876), *aff'g* 1 N.M. 593 (1874). The territorial statute was passed to define the status of Pueblo Indian tribes under United States jurisdiction and to establish their right to protect their lands from encroachment. *See Garcia v. United States*, 43 F.2d 873 (10th Cir.1930). Further, in *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, *cert. denied*, 368 U.S. 915 (1961), this Court, in examining whether a political subdivision of the state could extend its corporate limits to include lands of an Indian tribe, found that the terms upon which New Mexico was admitted to the United States left no room for a claim by the state to governmental power over the Indian tribes and Indian lands, unless Congress specifically granted jurisdiction or

unless the decisions of the United States Supreme Court sanctioned the exercise of jurisdiction. *Id.* at 330, 361 P.2d at 952. The territorial statute, which clearly was enacted to protect the right of Indians to aboriginal lands, cannot be extended to constitute a federal grant of general jurisdiction over Indian tribes to the State.

Tribal immunity cases generally center upon the Indian Reorganization Act of 1934, codified at 25 U.S.C. Sections 461-479 (1976). *See Felix S. Cohen's Handbook of Federal Indian Law* Ch. 6, § A4c (R. Strickland ed. 1982). Under Section 16 of the Act, Indian tribes have been found to have waived immunity by virtue of legislative ordinances enacted under a tribal constitution. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982). Further, federal courts generally have held that the "sue and be sued" proviso of a tribal corporate charter under Section 17 of the Act constitutes a waiver of immunity for the tribe as a corporate entity, although it does not waive the sovereign immunity of the tribe as a political entity. *Boe v. Fort Belknap Indian Community*, 455 F.Supp. 462 (D.Mont.1978), *aff'd*, 642 F.2d 276 (9th Cir.1981). However, the Pueblo of Acoma never has availed itself of the opportunity to adopt a constitution and incorporate under the Act. *See* An Ordinance Prescribing a Code of Law and Order for the Pueblo de Acoma Indian Reservation (1971). Consequently, the Pueblo has no legislative ordinance enacted under a tribal constitution or a corporate charter that arguably could provide the basis for an express waiver of sovereign immunity. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.1980), *aff'd*, 455 U.S. 130 (1982); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir.1982).

It is further urged that the State's exercise of jurisdiction over Sky City should be evaluated under the infringement test formulated in *Williams v. Lee*, 358 U.S. 217 (1959), and applied in *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (1977). *See also Foundation Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 734 P.2d 754 (1987). The infringement test determines whether the application of state law over Indian affairs would infringe upon the self-government of the Indians. *Chino*, 90 N.M. at 206, 561 P.2d at 479. In applying the test, the court considers the following criteria: (1) whether the parties are Indian or non-Indian; (2) whether the cause of action arose within Indian country; and (3) what is the nature of the interest to be protected. *Foundation Reserve Ins. Co.*, 105 N.M. at 515, 734 P.2d at 755.

Padilla argues that under the infringement test state jurisdiction over this cause of action is warranted because no unique Indian customs or laws are at stake, the cause of action arose off of Pueblo lands, and the interest to be protected is to guarantee the right to a remedy in state court for breach of contract to those who transact business with a tribal commercial entity outside Indian territory. The inherent weakness in Padilla's argument is that the infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity. In *Santa Clara Pueblo*, the United States Supreme Court recognized the dichotomy between state jurisdiction over individual tribal members and jurisdiction over the tribe

qua tribe. 436 U.S. at 58-59. The court in *Puyallup Tribe, Inc.* also made the same distinction. 433 U.S. at 172-73.

Padilla has made no allegations that the contract waives immunity and that, therefore, it confers subject matter jurisdiction upon the district court. Rather, Padilla argues that Pueblo of Acoma d/b/a Sky City Contractors is amenable to suit because it held itself out as a commercial entity to the outside business world and should be estopped from shirking its contractual obligations by cloaking itself with tribal immunity.

Padilla's contention that Pueblo of Acoma d/b/a Sky City Contractors is estopped from enjoying the same immunity as the tribe itself cannot withstand scrutiny. We accept the allegations in the complaint that Sky City is an unincorporated association registered to do business in New Mexico. Simply put, it is a subordinate economic organization of the tribe created for commercial purposes. *See White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). No representations to the contrary appear of record. This is not a case in which an Indian tribe has concealed or misrepresented that it was doing business itself off of the reservation. Padilla makes no such claim.

At oral argument, counsel for Acoma disclosed that a non-Indian agent obtained the state contractor's license that was necessary for Sky City to do business in the state. *See* NMSA 1978, § 60-13-12 (Repl.Pamp.1984). From this information, it was surmised further that Padilla might have negotiated his contract with the non-Indian agent. Even if Padilla did negotiate with Sky City's non-Indian agent, a fact not supported by the record, there is nothing

in the record to suggest that Sky City hid from Padilla that it was doing the business of the Pueblo. Once the Pueblo asserted its sovereign immunity, it was incumbent upon Padilla to show that the Pueblo should be equitably estopped to assert immunity from suit. The record says nothing of any representation upon which Padilla reasonably could rely that Sky City either waived its immunity or was acting in a capacity separate and distinct from the tribe. Moreover, given the requirement that waiver of tribal immunity be express and unequivocal, *Santa Clara Pueblo*, 436 U.S. at 58, it would be difficult at best to support a claim that a tribe could, through other than express and unequivocal conduct, be equitably estopped to assert its immunity.

We turn finally to a consideration of whether business conduct engaged in by a sovereign Indian tribe *off of its reservation* is clothed with the immunity which has been the subject of the foregoing discussion. We believe not. We know of no controlling law that divests the New Mexico courts of jurisdiction over Indian tribes for off-reservation business conduct.[2]

The United States Supreme Court has held the doctrine that "no sovereign may be sued in its own courts without its consent" does not necessarily support a claim of immunity in another sovereign's courts. *Nevada v. Hall*, 440 U.S. 410 (1979), *aff'g Hall v. University of Nevada*, 74 Cal.App.3d 280, 141 Cal.Rptr. 439 (1977) (*Hall II*). For reasons well articulated in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), the doctrine of sovereign immunity does not find favor in the common law of this state. It is not necessary to support in the courts of this

state any immunity to which another sovereign is not entitled under either acts of Congress or our legislature, or under a specific holding of the United States Supreme Court.

In *Hall v. University of Nevada*, 8 Cal.3d 522, 105 Cal.Rptr. 355, 503 P.2d 1363 (1972), *cert. denied*, 414 U.S. 820 (1973) (*Hall I*), the California Supreme Court, reversing the trial court, had held Nevada amenable to suit in California courts on the grounds that sovereignty stops at the state's border. The case was remanded for trial. On certiorari from *Hall II*, the United States Supreme Court did not accept the rationale that sovereignty stops at the state's border, but affirmed, holding that there is no constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister states. 440 U.S. at 426. Therefore, the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity. Because it was the policy of California to allow full tort compensation against itself, California could refuse to recognize a sister state's claim to sovereign immunity for a wrong committed by that state in California.

Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity. It is the policy of New Mexico to allow breach of written contract actions against the state. NMSA 1978, § 37-1-23. Therefore, we hold that, regardless of where the contract was executed, the district court may exercise

jurisdiction over an Indian tribe when the tribe is engaged in activity off of the reservation as an unincorporated association registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe.

The dismissal is reversed. We remand to the trial court to proceed in accordance with this opinion.

IT IS SO ORDERED.

/s/ Richard E. Ransom
Richard E. Ransom, Justice

WE CONCUR:

/s/ Harry E. Stowers, Jr
Harry E. Stowers, Jr., Justice

/s/ Mary C. Walters
Mary C. Walters, Justice

FOOTNOTES

1. Padilla contends as well that by doing business in the state Pueblo of Acoma d/b/a Sky City is susceptible to state court jurisdiction under the New Mexico "long arm" statute, NMSA 1978, Section 38-1-16 (Repl.Pamp. 1987). Reliance on this statute to confer jurisdiction is misplaced. Section 38-1-16 allows the courts of this state to assert in personam jurisdiction over nonresident defendants. *Moore v. Graves,* 99 N.M. 129, 654 P.2d 582 (Ct.App.1982).

2. We note that the extra-territorial nature of tribal conduct is relevant in determining the applicability of state regulation of tribal activities. Tribal activity beyond reservation boundaries would be susceptible to taxation by the state in the "absence of express federal law to the contrary." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973). Consequently, we would assume that when engaged in off-reservation construction projects the Pueblo of Acoma d/b/a Sky City Contractors, working under a state contractor's license, would be subject to the same regulatory regime as would any other licensed contractor. *See* Construction Indus. Licensing Act, NMSA 1978, §§ 60-13-1 to 59 (Repl.Pamp.1984 & Cum.Supp.1987). Here, however, the issue is not state regulation of the Pueblo's construction projects but, rather, state exercise of jurisdiction over the Pueblo of Acoma once the Pueblo has asserted sovereign immunity from suit brought by a private individual. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978).

APPENDIX 2

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. Cv 86-01292

FRANK PADILLA,

Plaintiff,

v.

PUEBLO OF ACOMA d/b/a
SKY CITY CONTRACTORS,

Defendant.

ORDER OF DISMISSAL WITH PREJUDICE
(Filed December 10, 1986)

THIS MATTER came before the Court on the Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The parties were represented by and through their respective counsel.

The Court having heard and considered the arguments of counsel and the authorities submitted by the parties to the Court, the Court finds good cause supporting the motion and finds that it should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-captioned cause be, and

it hereby is, dismissed with prejudice. Defendant is awarded the costs herein.

/s/ Frederick M. Mowrer
DISTRICT COURT JUDGE

Approved by:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE

AS TO FORM ONLY

/s/ Richard Earl
RICHARD EARL

CERTIFIED AS A TRUE AND CORRECT COPY
OF THE ORIGINAL FILED IN MY OFFICE.
THOMAS J. RUIZ, Clerk of the District Court

By: /s/ Stephanie Lesku, Deputy Date 1-16-87

APPENDIX 3

IN THE SUPREME COURT OF THE STATE
OF NEW MEXICO

Friday, June 3, 1988

NO. 16,835

FRANK PADILLA,

Plaintiff-Appellant,

vs.

PUEBLO OF ACOMA, d/b/a
SKY CITY CONTRACTORS,

Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellee for Rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Appellee for Rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX 4

Act of March 3, 1871, c.120, § 3, 16 Stat. 570; as amended. Acts of May 21, 1872, c.177, § 1,2, 17 Stat. 136; Pub.L. 85-770, Aug. 27, 1958, 72 Stat. 927. 25 U.S.C.A. § 81.

Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special

thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

APPENDIX 5

Pub.L. 93-638, Title I, § 102, 88 Stat. 2206, 25 U.S.C.A. 450f.

Contracts by Secretary of the Interior with tribal organizations

(c) Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions

The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the propisions of this subchapter to obtain adequate liability insurance: *Provided, however,* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

Pub.L. 93-638, § 103, as amended Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695; Pub.L. 100-202, § 101 (g), Dec. 22, 1987, 101 Stat. 1329-246, 25 U.S.C.A. 450g.

Contracts by Secretary of Health and Human Services with tribal organizations

(c) Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions

The Secretary of Health and Human Services is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to

obtain adequate liability insurance. *Provided, however,* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance. For purposes of section 233 of Title 42, with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under this section or section 450h(b) of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.

Pub.L. 93-638, Title I, § 110, Jan. 4, 1975, 88 Stat. 2213, 25 U.S.C.A. 450n.

§ 450n. Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

APPENDIX 6

Act of June 18, 1934, c.576, §§ 16, 17, 48 Stat. 988, 25 U.S.C.A. 476, 477.

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all

appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

APPENDIX 7

Act of Aug. 15, 1953, c.505, § 4, 67, Stat. 589; as amended Aug. 24, 1954, c.910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, § 2, 72 Stat. 545; July 10, 1984, Pub.L. 98-353, Title I, Section 110, 98 Stat. 342, 28 U.S.C.A. 1360.

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community, that is held in

trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX 8

Act of June 30, 1834, c.161, § 17, 4 Stat. 731; amended Feb. 28, 1859, c.66, § 8, 11 Stat. 401; 25 U.S.C.A. 229.

§ 229. Injuries to property by Indians

If any Indian, belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury.

AMICUS CURIAE

BRIEF

No. 88-415

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

PUEBLO OF ACOMA,

Petitioner,

v.

FRANK PADILLA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

BRIEF OF THE ALL INDIAN PUEBLO COUNCIL AND THE PUEBLO OF SANTO DOMINGO, AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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Council for Amici Curiae

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QUESTION PRESENTED FOR REVIEW

Whether an Indian tribe is stripped of its sovereign immunity when it engages in business activity outside formal reservation boundaries, and can thus be subjected to unconsented and unauthorized litigation in state court.

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Amici Curiae, the All Indian Pueblo Council and the Pueblo of Santo Domingo submit this brief, which has been consented to by both parties, and respectfully pray that a Writ of Cer-

tiorari issue to review the judgment and opinion of the New Mexico Supreme Court entered in this proceeding on May 9, 1988.

INTEREST OF AMICI CURIAE

Amicus All Indian Pueblo Council (AIPC) is a political confederation consisting of the nineteen Pueblo Indian tribes in New Mexico, which dates from prior to the Pueblo Revolt of 1680.[1] The organization has a Constitution and Bylaws that authorize it to act on behalf of the nineteen Pueblos in matters of common concern. Although all members of the organization are Pueblos, there is striking diversity among them. Five

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[1]The Pueblo Indian tribes that comprise AIPC are: Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni.

different Indian languages are spoken among the Pueblos,[2] they range in size from among the smallest tribes in the country to among the largest, and their tribal governments vary from centuries-old traditional theocratic ones to modern civil governments with written constitutions under the Indian Reorganization Act.[3]

Notwithstanding differences among the Pueblos, however, centuries of dealings with outside governments and the tangible cohesion that marks Pueblo life generally have created a strong degree of unity among the tribes. Today AIPC works on many fronts for the common welfare of

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[2] Keres, Tiwa, Tewa, Towa, and Zuni.

[3] Pojoaque Pueblo has only 89 members, whereas Zuni has over 10,000, as does Laguna. There are approximately 50,000 Pueblo Indians in New Mexico. New Mexico has the largest percentage of Indians in its population of any state, approximately 10 percent.

the Pueblos. Issues of sovereignty, particularly threats to the basic integrity of Pueblo self-government, are of deep concern to all the Pueblos. When the Pueblo of Acoma brought the New Mexico Supreme Court decision herein before the All Indian Pueblo Council, it generated a profound realization that the Pueblos were vulnerable in a way that had never before arisen. Like the Pueblo of Acoma, many of the Pueblos hold lands outside of their Spanish grant lands and their reservations. Many of these lands were acquired pursuant to the congressional policy of encouraging the Pueblos to acquire new lands to replace those lost under the Pueblo Lands Act of June 7, 1924, ch. 331, 43 Stat. 636.[4] As a

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[4]Section 19 of the Pueblo Lands Act reads:

> That all sums of money which may hereafter be appropriated

> by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construciton of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians.

This was supplemented by the Act of May 31, 1933, ch. 45, §§1,5 48 Stat. 111 to provide that land purchases be approved by the governing authorities of the Pueblos, and that the Pueblos could themselves initiate such purchases.

Pursuant to this policy, as well as to the policy of the Indian Reorganization Act, Pueblos have acquired numerous tracts of land outside their existing boundaries. Some of the lands are held in trust by the United States, but many tracts are held in fee, as are most

continuation of that policy, and in accordance with the strong federal policy of promoting tribal economic development and self-sufficiency, several Pueblos have acquired yet other lands to augment their modest land holdings. It has never been thought that Pueblo activities on any of these lands would subject the Pueblo governments and their treasuries to a loss of fundamental immunities or subject them to suit in potentially hostile state courts before non-Indian juries.

In addition to engaging in activities on Pueblo lands located outside grants and reservations, as the

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Pueblo lands. The practice of purchasing additional lands as the need arises dates back to Spanish times. Several Pueblos' land bases consist in part of purchased Spanish land grants held in fee. See, e.g., Garcia v. United States, 43 F.2d 873 (10th Cir. 1930); Pueblo of Santa Ana v. Baca, 844 F.2d 708 (1988); United States v. Baca, 184 U.S. 653 (1902).

Pueblo of Acoma did in this case, all Pueblos by necessity do business and engage in commercial dealings on non-Indian lands outside their grant and reservation boundaries.[5] Until the decision herein, there was a clear, bright-line rule of law that tribal sovereign immunity was coextensive with the sovereign immunity of the United States and that such immunity protected tribes everywhere, without regard to geographical hair-splitting. AIPC and its members, in working to develop their

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[5]Every Pueblo has bank accounts outside their own lands. Every Pueblo has frequent occasion to transact business in Albuquerque and Santa Fe. Bureau of Indian Affairs and Indian Health Service offices are located in Albuquerque and Santa Fe, requiring frequent trips to those cities. Also, the Pueblos jointly own land in Albuquerque and operate the Indian Pueblo Cultural Center, a major tourist attraction that features a Pueblo museum, a gift shop, and a restaurant serving Indian food.

economies, have relied upon that long-standing, well known rule of law. It provided for predictability, was unchallenged by Congress, gave to Indian tribes much-needed protection, and was flexible enough to allow tribes to waive their immunity from suit in a limited fashion as an inducement for non-Indians to conduct business with the tribes. The decision of the New Mexico Supreme Court herein threatens to disrupt a stable field of law around which settled expectations have grown.

Even if the decision below were limited to the contract setting in which it arose, the harm visited upon the Pueblos would be substantial. The decision, however, plainly portends much wider liability for AIPC and its members. If breach of contract actions are allowed now, when will tort and other causes of

action be recognized? The scope of potential liability appears wide indeed, particularly in New Mexico, where it is no simple matter to determine whether a cause of action arises on or off the grants and reservations.6

Amicus Pueblo of Santo Domingo is one of the constituent Pueblos of the All Indian Pueblo Council. It is the traditional capital of the All Indian Pueblo Council, and serves as the site of the first AIPC meeting of each year. Keres-speaking, it is the largest of the Rio Grande Pueblos, and is situated roughly 40 miles north of Albuquerque. It is one of the most traditional and

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[6]This is so both because some areas, particularly in northwestern New Mexico are extensively checker boarded and of unresolved reservation status, see, Navajo Tribe v. New Mexico, 809 F.2d 1455 (10th Cir. 1986), and because of the habit of the New Mexico courts to bootstrap reservation cases into state court. See Part IV, below.

conservative Indian tribes in America, operating to this day under a complex theocratic system of government that dates back at least 1,000 years to the Anasazi culture of the San Juan Basin.[7] Santo Domingo's Tribal Council, a group of more than 30 men who serve for life, regard state court decisions affecting tribal self-government warily because of the frequently adversarial nature of relations between the Pueblos and the state government.

Although Santo Domingo confines most of its business activities to the Pueblo, its officers must often transact business in Albuquerque and Santa Fe. The Pueblo has a few tribally owned enterprises, e.g., a gas station, a gift shop, and a museum, which must also transact business

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[7] See, C. Lange, "Santo Domingo Pueblo," in 9 Handbook of North American Indians 379 (W. Sturtevant ed. 1979).

beyond the Pueblo's borders. The Pueblo's business and accounting office is, for sake of convenience, located in Albuquerque, as are the bank accounts that hold the Pueblo's modest financial resources.

In some of its business dealings, those with whom the Pueblo contracts want a practicable method for resolving disputes inserted in contractual agreements, but never does the Pueblo completely waive its immunity and consent to suit in state courts. Various methods are used instead, such as arbitration in accordance with rules of the American Arbitration Association, or referral to the Secretary of the Interior, or a limited waiver of immunity for suit in federal court.

The decision of the New Mexico Supreme Court creates new uncertainties

for the Pueblo and exposes it to new liabilities that it never expected. If the decision below is not reversed, Santo Domingo's efforts to stimulate economic development and interact with the outside economy could well be stymied, and the Pueblo could be forced to retrench in many areas. It is thus vitally important to the Pueblo that its long-standing protection from unconsented suit, which has nurtured the Pueblo's entry into the commercial sphere, be restored by a reversal of the New Mexico Supreme Court's novel effort to whittle away long extant tribal rights derived from the Indian tribes' unique relationship with the United States.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NEW MEXICO SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT UPHOLDING TRIBAL SOVEREIGN IMMUNITY.

In its first pronouncement on the sovereign immunity of Indian tribes, this Court in Turner v. United States, 248 U.S. 354 (1919), stated flatly in dicta that "without authorization from Congress, the [Creek] Nation could not then have been sued in any court; at least, without its consent." At 358 (emphasis added). Citing Turner, the Court later enunciated the categorical principle that

> "these Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."

United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) (emphasis

added). Significantly, the activities that gave rise to the litigation in U.S. Fidelity & Guaranty Co. did not take place within an Indian reservation, but rather occurred after the lands of the Choctaw and Chickasaw Nations had been allotted and their tribal governments dissolved.[8] The fact that the Court did not even mention the status of the location of the surety company's cross-claim against the tribes, suggests strongly that the location was irrelevant. The tribes were immune from suit in any event, irrespective of reservation status and technical considerations about the cause of action's place of origin.

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[8]The mineral leases at issue involved fee lands segregated for the purpose of leasing and selling coal and asphalt deposits for the benefit of the tribes. See F. Cohen, Handbook of Federal Indian Law 435-436 n. 81 (1942 ed.).

In Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977), the Court squarely held that, even though the litigation involved fishing activities of the tribe both on and off the reservation, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." At 172 (emphasis added). Consequently, the action had to be dismissed en toto as to the tribe. This unequivocal declaration that tribes are immune from suit in state court whether the action arises on or off the reservation is plainly determinative of the issue in this case.

The New Mexico Supreme Court, however, not only failed to follow these controlling precedents, it did not even

deign to discuss or distinguish them.[9] Certiorari should be granted to correct this glaring divergence from the decisions of this Court.

II. THE DECISION OF THE NEW MEXICO SUPREME COURT CONFLICTS WITH AN UNBROKEN SERIES OF FEDERAL AND STATE COURT DECISIONS.

The decision below cites no court decision that tribes lose their immunity from unconsented suit when they venture outside their borders. Instead, the decision ignores several decisions that

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[9] Indeed, one of the peculiarities of the decision below is the way it pays lip service to the decisions of this Court in the course of rejecting insubstantial arguments of the Respondent, but then proceeds simply to ignore those decisions when it reaches the critical issue. The same kind of dissembling took place in the New Mexico Court of Appeals decision in Cotton Petroleum Corp. v. New Mexico (No. 37-1327) which is presently before the Court on appeal. Nor are the state courts in New Mexico alone in the practice. See, New Mexico v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985).

hold the opposite. Counsel is unaware of any precedents that support the holding below. It appears to be simply an orphan on the waters of federal Indian law.

At least one decision from the Tenth Circuit, which includes New Mexico, conflicts with the decision below.10 In Oklahoma v. Graham, 822 F.2d 951 (10th Cir. 1987), vacated and remanded, 108 S.Ct. 951 (1987), on remand, 846 F.2d 1258 (1988), the Chickasaw Nation owned a motel in which it conducted bingo games and sold cigarettes. The state sued officials of the tribe in state court to collect taxes allegedly owed by the tribe, but the court of appeals upheld an order of dismissal, following removal to federal district court, on the ground of

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10 See also, Adams v. Murphy, 165 F. 304 (8th Cir. 1908), which involved a contractual dispute between a tribe and an attorney retained to represent it.

sovereign immunity. As in U.S. Fidelity & Guaranty Co., 309 U.S. at 506, which also involved the Chickasaw Tribe, the court was unconcerned with the legal status of the property on which the motel stood. In order to survive a motion to dismiss, according to Graham, a party suing an Indian tribe must plead either a valid waiver of immunity or consent to suit. 846 F.2d at 1260. Pleading the non-reservation status of the land upon which the cause of action arises does not fulfill these requirements.

The law is the same in other federal circuits. The Ninth Circuit, in United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), held that only a tribe's voluntary intervention in a lawsuit waived its immunity from suit in a case involving on and off-reservation fishing. Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st

Cir. 1979), upheld a tribe's immunity in a contract action where all of the contracted work was performed off the reservation. In Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966) cert. denied, 385 U.S. 918 (1966), sovereign immunity was sustained when raised by an off-reservation bank on a tribe's behalf in a garnishment proceeding against a tribal bank account.

The closest analogies to the facts of this case come from the neighboring state of Arizona, whose courts have consistently upheld tribal claims of sovereign immunity for off-reservation activities. The seminal case is Morgan v. Colorado River Indian Tribe, 443 P.2d 421 (Ariz. 1968), which barred a tort claim in a case where a swimmer was killed at an off-reservation tribal

marina run by a tribal business enterprise. The Arizona courts also upheld claims of immunity in S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz. App. 1983), review denied (1984); and in Dixon v. Picopa Construction Co., 755 P.2d 421 (Ariz. App. 1987), review granted (June 21, 1988).

III. THE DECISION BELOW, CONFINING TRIBAL SOVEREIGN IMMUNITY TO RESERVATION LANDS, IGNORES AND CONTRADICTS SETTLED FEDERAL COMMON LAW ON THE UNIQUE STATUS OF INDIAN TRIBES AND THEIR RELATIONSHIP TO THE UNITED STATES AND THE INDIVIDUAL STATES.

The New Mexico Supreme Court mechanically applied the decision in Nevada v. Hall, 440 U.S. 410 (1979), to Indian tribes, equating tribes with states, and holding that tribes like states, can be sued in another sovereign's courts. The court concluded that the exercise of jurisdiction was solely a

matter of comity because no controlling law has divested the state courts of jurisdiction. Petition App. 9-11.

The court's simplistic analysis is flawed and pays no heed to federal common law, federal guardianship of the Indian tribes, and to the basic rule that tribal sovereign immunity "is rooted in the unique relationship between the United States government and the Indian tribes." Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047, 1052 (9th Cir. 1985), rev'd in part, 474 U.S. 9 (1985); see also, Haile v. Saunooke, 246 F.2d 293, 298 (4th Cir. 1957). In U.S. Fidelity & Guaranty Co., the Court specifically alluded to the mergence of a tribe's own immunity with that of the United States.11 309 U.S. at

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[11]The Court's analogy to Indian lands is telling. Because of the dependent status of Indian tribes, the

ultimate fee title to their lands was lodged with the United States, with the right of use and occupancy residing in the tribes. This landholding arrangement has been described as one of the "inherent limitations on tribal powers." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978), citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Consequently, a violation of the rights of the Indians to the beneficial use of their lands "violates the governmental rights of the United States." Heckman v. United States, 224 U.S. 413, 438 (1912). Unauthorized State efforts to obtain land cessions from tribes by treaty are void. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). Just so, because of the tribes' dependent status, their pre-existing sovereign immunity "passed to the United States for their benefit." U.S. Fidelity & Guaranty Co., 309 U.S. at 512. Thus the protective umbrella of federal power was placed over and reinforces the tribes' own immunity. This too, is intrinsic in the unique status of the tribes. State actions in derogation of tribal sovereign immunity should be regarded as violations of the governmental rights of the United States and, as with state efforts to avoid federal protection of Indian land, must fail. The mergence of a tribe's sovereign immunity with that of the United States explains Justice O'Connor's otherwise paradoxical statement that tribal immunity from suit is both "federally conferred" and also "a necessary corollary to Indian sovereignty

512. Hence the common declaration that the sovereign immunity of the Indian tribes "is co-extensive with that of the United States." See, Ramey Construction v. Mescalero Apache Tribe, 673 F.2d 315, 319-320 (10th Cir. 1982); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982); Kennerly v. United States, 721 F.2d 1252, 1258 (9th Cir. 1983).

It has long been settled that the sovereign immunity of Indian tribes is so .ghtly bound up with the immunity of the United States, that tribes cannot be sued in circumstances where the United States itself would be protected.12 Because the

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and self-governance." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890 (1986).

[12]This does not mean, however, that tribes can be sued whenever the United States can. Congress is free to waive either the government's or the tribes' immunity from suit individually. Any

United States is immune in all state courts and in all jurisdictions within the territorial limits of the country, a fortiori the Indian tribes are similarly protected.

The New Mexico Supreme Court erred in assuming that Indian tribes are equivalent to states. That proposition was rejected at an early date, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), as was the proposition that the tribes are foreign nations. At one time the tribes were "self-governing sovereign political communities," but

> their incorporation within the territory of the United States, and their acceptance of its

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such waiver must be express and is strictly construed. United States v. Sherwood, 312 U.S. 584 (1941); United States v. Testan, 424 U.S. 392 (1976); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Congress has chosen to waive the United State's immunity much more frequently and extensively than it has the immunity of the tribes.

> protection, necessarily divested them of some of the sovereignty which they had previously exercised.

United States v. Wheeler, 435 U.S. 313, 323 (1978).

The Indian tribes hold the unique status of "domestic dependent nations." Cherokee Nation, 30 U.S. at 17. Their relationship to the United States "is marked by peculiar and cardinal distinctions which exist nowhere else," but resembles "that of a ward to his guardian." Id. at 16-17. By relinquishing a portion of their sovereignty and conceding their dependence on the United States, the Indian tribes were guaranteed protection by the United States. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555-561 (1832); United States v. Kagama, 118 U.S. 375, 382-384 (1886); Morton v. Mancari, 417 U.S. 535, 551-552 (1974); Heckman v. United States, 224

U.S. 413, 444-445 (1912); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978). That duty of protection is a "solemn commitment of the Government," which "is drawn both explicitly and implicitly from the Constitution itself." Morton v. Mancari, 417 U.S. 535, 551, 552 (1974). Although congressional enactments and Interior Department superintendence of Indian Affairs are the most obvious vehicles for meeting the obligations of trust owed by the United States, several protections arise from the unique status of the tribes vis-a-vis the United States.13 This is particularly so in the

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[13]This Court has noted that the powers of Indian tribes may be limited implicitly by their status. Oliphant, 435 U.S. at 208. Thus, Indian tribes have no power to subject non-Indian lawbreakers to tribal criminal procedures. Id. As part of the quid pro quo of submitting to overriding federal sovereignty, however, tribes have received special protection of their remaining rights and powers. Thus, special canons

area of litigation. See, e.g., Heckman 224 U.S. at 413; Northern Pacific Ry. v. United States, 227 U.S. 355 (1913); United States v. Osage County Bd. Commr's, 251 U.S. 128 (1919); United

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of construction provide that legislation favoring tribal interests is to be liberally construed, whereas abrogation of tribal rights must be "clear and plain." F. Cohen, Handbook of Federal Indian Law 221-225 (1982 ed.). Special rules of federal preemption of state law also apply to protect tribes from encroachments on their rights of self-government. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). Tribes are endowed with exclusive jurisdiction over normally transitory causes of action brought against Indians. Williams v. Lee, 358 U.S. 217 (1959); Kennerly v. District Court, 400 U.S. 423 (1971); Fisher v. District Court, 424 U.S. 382 (1976). Tribes even have immunities that exceed those of the United States. Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 856-57 (1982) (Rehnquist, J., dissenting); see also, C. Wilkinson, American Indians, Time, and the Law 98-99 (1987). It is inconsistent with tribes' status as dependent sovereigns under the protection of the United States to allow state courts and state juries to exert power over the tribes, their treasuries, and their specially protected rights.

States v. Minnesota, 270 U.S. 181 (1926); United States v. Candelaria, 271 U.S. 432 (1926); Mott v. United States, 283 U.S. 747 (1931), Minnesota v. United States, 305 U.S. 382 (1939); Drummond v. United States, 324 U.S. 316 (1945); Cramer v. United States, 261 U.S. 219, 233-234 (1923); United States v. Fitzgerald, 201 F.295 (10th Cir. 1912); Pueblo of Picuris v. Abeyta, 50 F.2d 12 (10th Cir. 1931).

The decision below ignored the fact that federal protection of the Indian tribes arose from the need to insulate them from the individual states and protect them from encroachments by the states and their citizens. It was long ago recognized that the tribes

> owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so

> largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen.

Kagama, 118 U.S. at 384.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). In fact, the Constitution itself intended to shield the tribes from the states and place responsibility over Indian affairs exclusively with the federal government. The Indian Commerce Clause grew out of profound dissatisfaction with the fact that the Articles of Confederation split power over relations with the Indians between the federal government and the states in which the tribes resided.

Cherokee Nation, 30 U.S. at 19. Experience under the Articles showed that the "only efficient way of dealing with the Indian tribes was to place them under the protection of the general government." U.S. v. 43 Gallons of Whiskey, 93 U.S. 188, 194 (1876). The Constitutional scheme for Indian affairs was undertaken expressly at the expense of the states, and it placed the tribes exclusively under the authority of the federal government.14 Worcester, 31 U.S. at 559;

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14 The constitutional framework long preceded the federal policy of placing Indians on Indian reservations. See, S. Tyler, A History of Indian Policy 70-94 (1973). Tribal sovereign immunity, particularly immunity from suit in the state courts, also preceded the reservation policy. Tribal sovereign immunity took the form enunciated in U.S. Fidelity & Guaranty Co. upon ratification of the Constitution, specifically the Indian Commerce Clause, which divested the states of a role in Indian affairs, even within state boundaries.

This Court has stated that the various instruments that underlay the "intricate web of judicially made Indian

law, cannot be interpreted in isolation, but must be read in light of the common notions of the day and the assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). As stated by Chief Justice Marshall in Cherokee Nation,

> Intending to give the whole power of managing those [Indian] affairs to the government about to be initiated, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation.

30 U.S. at 19 (emphasis added); see also, Worcester, 31 U.S. at 558-559. By any reckoning, under the Constitution, difficulties arising from tribal activities outside the tribes' often loosely defined territories were the problem of the federal government in the early republic. The prospect of subjecting Indian tribes to lawsuits in state courts would have been unthinkable. See, e.g., Act of June 30, 1834, ch.161, §17,4 Stat. 729, 731. Even much later, when Congress sought to allow judicial recovery against tribal funds for depredations committed against non-Indians, it passed a specific authorization consenting to suit, but not in state court, and without any consideration of whether the depredations occurred inside or outside reservations. Act of March 3, 1891, ch. 538, 26 Stat. 851 (conferring jurisdiction on Court of Claims to

Cherokee Nation, 30 U.S. at 18-19.

The plenary authority of Congress over Indian affairs is not simply a sword with which to control the tribes, it is also a shield to protect the tribes from the different states within which they reside. It has always been the law that tribes could not be sued in state court without congressional consent, regardless of the technical situs of the cause of action. That fixture of the legal landscape has never been disturbed until the decision below. The New Mexico Supreme Court's patently revisionist view of tribal sovereign immunity fails to account for the federal common law doctrines of federal guardianship over the tribes and the tribes' unique status as dependent sovereigns. This Court

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adjudicate claims against Indian tribes for property damage); see, United States v. Martinez, 195 U.S. 469 (1904).

should not permit the erroneous decision below to stand without allowing a full airing of these issues.

IV. THE DECISION BELOW UNDERCUTS THE ROLE OF CONGRESS, AND TAKEN WITH OTHER DECISIONS OF THE NEW MEXICO SUPREME COURT, COULD HAVE A DRASTIC EFFECT UPON THE INDIAN TRIBES OF NEW MEXICO AND WILL INTERFERE WITH OVERRIDING FEDERAL POLICIES PROMOTING TRIBAL ECONOMIC DEVELOPMENT AND SELF-GOVERNMENT.

Heretofore the subject of tribal sovereign immunity has been governed by a fixed, unequivocal rule of law that "'without congressional authorization,' the 'Indian Nations are exempt from suit.'" Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), quoting U.S. Fidelity & Guaranty Co., 309 U.S. at 512. This clear-cut rule has been accepted for decades without substantial challenge, and with Congress's continuing approval. As was said in the far more difficult Martinez case, where there arguably was

congressional consent for suits against tribes,

> a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.

Id. at 60. If tribes are to be subjected to suit in state courts for their off-reservation activities, that decision must be made by Congress, which alone has the authority to do so and the fact-finding ability to fine-tune the waiver and to protect fundamental tribal and federal interests.15

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[15] See, e.g., the Indian Gaming Regulatory Act, Pub. L. No. 100-497, ___ Stat. ___ (signed October 17, 1988) [For text, see, S. 555, 100th Cong., 2d Sess., 134 CONG. REC. S 12643-12663]. In response to concerns about Indian gaming, some of which the Court discussed in California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083 (1987), Congress enacted comprehensive regulatory legislation following hearings and an extensive investigation. In order to meet tribal objections to state regulatory control,

The decision below points to no congressional authorization for the suit before it, because there is none. Congress has long been on notice of the prevalent rule of federal common law, yet it has made no sweeping inroads on tribal sovereign immunity, whether on or off-reservation. Established usage thus prescribes deference to Congress in this area. The New Mexico Supreme Court, however, erroneously neglected to show any deference to the role of Congress as the ultimate arbiter of the scope of tribal sovereign immunity, instead imposing a novel rule that Congress must

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Congress fine-tuned the statutory scheme to provide for voluntary tribal/state compacts for a certain class of gaming activity. This legislation shows the Court's wisdom in exercising restraint when confronted by demands that tribal powers and immunities be cut back. A contrary ruling in Cabazon would have effectively precluded the careful balancing achieved by Congress.

act affirmatively in order to exempt tribes from suit for their off-reservation activities. The New Mexico Supreme Court thus seeks to seize for itself the authority that is Congress's alone.

Even though the court below purported to see a clear distinction between on and off-reservation activity, the distinction is in fact murky and opens tribes up to an unknown range of liabilities.16

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[16]The New Mexico Supreme Court relies for the distinction on this Court's decision in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). Mescalero specifically involved an Indian tribe with a reservation and off-reservation lands held under lease from the National Forest Service, where the tribe itself brought the suit. It is thus irrelevant to the issue of sovereign immunity. Moreover, neither that decision nor any other decision of this Court has held that reservation boundaries are impermeable barriers. On the one hand, state authority can be asserted inside a reservation where state interests are substantial enough and tribal

self-government and federal policies are not impaired. California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083, 1091-1092 (1987). White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-145 (1980). On the other hand, tribal and federal authority can be extended outside the reservation in particular circumstances. Puyallup Tribe, 433 U.S. 165 (1977); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974); Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Indian Child Welfare Act, 25 U.S.C. §1903. There is no compelling reason why tribes should be stripped of all their special rights and immunities when they venture beyond their boundaries, as they must do. It should further be noted that Mescalero did not involve the lands of the Pueblo Indians, who hold their lands by a different and more complex tenure. See, Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985). Moreover, Mescalero should be adjudged to have been modified by subsequent decisions making "Indian country," not just reservations, the relevant jurisdictional line of demarcation between tribal/federal power and state power. DeCouteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). The court below failed to recognize this development and also failed to engage in any analysis of whether the land on which the dispute arose might actually be Indian country. Another question raised by the opinion below .s whether tribes whose reservations have been disestablished have any

Although the court below found irrelevant the location where the contract alleged to have been breached was entered into, on other occasions it has upheld state court jurisdiction based solely on the fact that a contract was signed off the reservation, even though the remaining events all took place inside the reservation. Foundation Reserve Ins. Co. v. Garcia, 734 P.2d 754 (N.M. 1987); see also, State Securities v. Anderson, 506 P.2d 786 (N.M. 1973). In Garcia, the state district court was permitted to adjudicate the particulars of an automobile accident that occurred inside the San Juan Pueblo grant, which involved a tribal member, simply because

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sovereign immunity at all, or whether their sovereign immunity simply follows title to discrete tracts of land still held by the tribes and their allottees. See, id., at 425; Rosebud Sioux Tribe v. Kneip, 430 U.S. 585 (1977).

the insurance contract had been signed a few miles away, barely outside the grant. As Garcia shows, there is a danger that federal law will be circumvented and causes of action will be bootstrapped into state court simply because one act in a chain of events takes place outside the reservation. Taken together with Garcia, the decision below portends that tribes will be sued in contract actions in state court where the only off-reservation act is the signing of the contract.17 What the New Mexico Supreme Court sees as a simple distinction, looked at more carefully, is the first step down the slippery slope to major

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[17] Such a holding does an end run around the Court's decisions requiring resort to tribal courts in accordance with the federal policy of protecting tribal sovereignty. Williams v. Lee, 358 U.S. 217 (1959); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. La Plante, 107 S.Ct. 971 (1987).

inroads on tribal sovereign immunity, even within the reservations. Eliminating the clarity of the existing rule cannot help but create many uncertainties, and will also certainly spawn much new litigation. This will place new strains on tribal resources, and will add to the already excessive burden on the courts.

Another case suggestive of the danger is New Mexico Dep't of Human Services v. Jojola, 660 P.2d 590 (N.M. 1983), cert. denied, 464 U.S. 803 (1983). There the New Mexico Supreme Court upheld state court jurisdiction over a paternity and child support action against a tribal member domiciled on the Isleta Pueblo grant, on the grounds that the mother, a tribal member who also resided within the grant, had assigned her support rights to the state at a location outside the

reservation. Jojola thus holds that even an on-reservation dispute between two tribal members can be forced into state court if one of the parties assigns his or her rights to a non-Indian outside the reservation. The decision below in this case thus carries the pronounced and destructive implication that the New Mexico courts might readily apply Jojola against tribal governments and find off-reservation causes of action arising solely from the act of assigning one's rights to a third party.18

The obvious willingness of the New Mexico courts to engage in jurisdictional

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[18] If, for example, a party entered into a contract with a tribe at a location on the reservation, and all work under the contract was performed on the reservation, under Jojola there might still be state court jurisdiction if that party assigned his rights to a third party at a site outside the reservation. The simple act of assignment creates an off-reservation cause of action against the tribe, according to Jojola's logic.

legerdemain in order to expand state authority over Indian tribes and their members, and their manifestly cramped view of Williams v. Lee, 358 U.S. 217 (1959), and the sovereign right of Indian tribes to make their own laws and be governed by them, requires this Court's corrective intervention.

The decision below subjects the tribes of New Mexico, and potentially elsewhere, to a new vulnerability, the possible loss of their scarce tribal assets in unconsented litigation. The mere prospect of such exposure necessarily has a chilling effect on tribes' activities, and can only undercut the profound federal policy "of encouraging tribal self-sufficiency and economic development". California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083, 1092 (1987). In the face of uncertainty over

piecemeal erosion of sovereign immunity, tribes must give serious thought to reducing or curtailing their off-reservation activities. Even on-reservation dealings are no longer safe. A single tort claim could wipe out the entire financial reserve of most tribes, including many of those who have associated together in AIPC.

At present, tribes and those with whom they deal are free to negotiate limited waivers of immunity or adopt methods of dispute resolution that preserve immunity from suit. The extensive congressional scheme to promote tribal self-government and economic development was put into place during a time when the breadth of tribal sovereign immunity was fixed by the concise rule of law that only Congress could alter this special protection accorded the tribes.

Policies, programs, plans, and ventures have all been undertaken in the secure knowledge of this rule. In a very few instances, Congress has cautiously restricted or placed modest conditions on tribal sovereign immunity. See, e.g., Indian Self-Determination Act, 25 U.S.C. §§450f,g,n.; F. Cohen, Handbook of Federal Indian Law at 324 (1982 ed.); U.S. Dept. of Interior, Federal Indian Law 491 (1958). In view of Congress's own solicitude for tribal sovereign immunity, and the fact that very real expectations and ways of doing business have grown up around the bright-line rule, the decision below can only be viewed as highly disruptive and full of potential mischief, both to the tribes and to federal policies that stand to be thwarted. Certiorari should be granted to consider the New Mexico Supreme

Court's jarring assault on settled federal common law and the vital interests of Indian tribes and congressional policy.

CONCLUSION

For the foregoing reasons, amici All Indian Pueblo Council and the Pueblo of Santo Domingo, pray earnestly that this Court issue a Writ of Certiorari to review the judgment and opinion below of the New Mexico Supreme Court.

Respectfully submitted this 27th day of October, 1988.

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OPPOSITION

BRIEF

No. 88-415

In The

Supreme Court of the United States

October Term, 1988

PUEBLO OF ACOMA,

Petitioner,

v.

FRANK PADILLA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an Indian tribe which is engaged in commercial activity off its reservation as an unincorporated association, registered and authorized to do business in the State, is subject to the jurisdiction of New Mexico state court for a claim asserted against the tribe arising out of such off-reservation activity.

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STATEMENT OF THE CASE

Respondent, Frank Padilla ("Padilla"), filed suit against the Pueblo of Acoma d/b/a Sky City Contractors ("Acoma") for breach of two written contracts for personal services. Padilla's complaint with the writings evincing the agreements between the parties attached as exhibits is printed as Appendix 1 hereto. Acoma appeared specially and moved to dismiss on the grounds of sovereign immunity, arguing that the state court was without subject matter jurisdiction to adjudicate claims brought against an Indian tribe. The state district court agreed and dismissed Padilla's complaint with prejudice—which order is printed in Acoma's petition to this Court as Appendix 2.

The New Mexico Supreme Court reversed, holding precisely that:

> [R]egardless of where the contract was executed, the district court may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity off the reservation as an unincorporated association registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off reservation activity of the tribe.

Padilla v. Pueblo of Acoma, — N.M. —, 754 P.2d 845, 850 (1988). The opinion of the New Mexico Supreme Court is printed as Appendix 1 to Acoma's petition herein.

Acoma petitioned this Court for a writ of certiorari on August 31, 1988. On September 16, 1988, Acoma filed in state district court its "Answer to Complaint for Breach of Contract and Fraud and Counterclaim". Acoma's answer and counterclaim are printed herein as Appendix 2.

ARGUMENT AND AUTHORITIES

As a preliminary matter it should be noted that this case is before the Court essentially to review the state district court's ruling on Acoma's motion to dismiss Padilla's complaint for want of subject matter jurisdiction. Acoma's challenge to state court jurisdiction amounts to a "facial" attack upon Padilla's complaint (as opposed to a "factual" attack upon Padilla's assertion of jurisdiction). The distinction is important: with a facial attack upon subject matter jurisdiction, the court must consider the allegations in a plaintiff's complaint as true. A factual attack challenges jurisdiction in fact and matters outside the pleadings such as testimony or affidavits may be considered. *Menchacha v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980), *cert. denied* 449 U.S. 953; *Mortensen v. First Federal Savings & Loan Association*, 549 F.2d 884 (3rd Cir. 1977); *Helton v. United States*, 532 F.Supp. 813 (S. D. Ga. 1982).

Therefore, the facts alleged in Padilla's complaint must be accepted as true. Moreover, at no time has Acoma controverted, by affidavits or with testimony, the allegations in Padilla's complaint which are central to the New Mexico Supreme Court's holding. A summary of those facts may be helpful:

Acoma is an unincorporated association registered to do business in the State of New Mexico and actually doing business in Cibola County, New Mexico, as Sky City Contractors (Appendix 1, Complaint: Count I, Paragraph 2; Exhibits A, B and C). Among the Exhibits attached to Padilla's complaint are invoices with the title: "Pueblo of Acoma d/b/a Sky City Contractors" (Appendix 1, *Id.*).

One of the contracts in question was for work to be performed at "Beaverhead" in the Gila National Forest (Appendix 1, Complaint: Count I, Paragraph 4; Exhibit B). Although not specifically pleaded by Padilla, it is generally understood in New Mexico that the Gila National Forest is not a part of nor adjacent to the Acoma Reservation, nor is it under Acoma's dominion and control.

The other contract entered into by the parties was for work to be performed at "Los Cerritos" (Appendix 1, Complaint: Count I, Paragraph 3; Exhibit A). Los Cerritos is also not a part of the Acoma Indian Reservation, although it may be on land owned or leased by Acoma. Acoma's answer and counterclaim admit that Los Cerritos is not a part of the Acoma Reservation (Appendix 2, Answer to Complaint for Breach of Contract and Fraud and Counterclaim: "First Defense"; "Fifth Defense").

These facts are important to this Court's consideration of Acoma's petition because they establish that Acoma was holding itself out in the State of New Mexico as a general contractor, that it was so registered and authorized by the State, and that it was conducting its general contracting business beyond its reservation boundaries for its own pecuniary gain.

I. THE NEW MEXICO SUPREME COURT'S NARROW HOLDING, WHICH ONLY SUBJECTS ACOMA TO STATE COURT JURISDICTION FOR CLAIMS ARISING OUT OF ACOMA'S COMMERCIAL ACTIVITIES BEYOND ITS RESERVATION BOUNDARIES, SHOULD BE UPHELD

Acoma would have this Court believe that the decision of the New Mexico Supreme Court has, in a single stroke,

completely undone the entire concept and framework of Indian tribal sovereign immunity. Acoma calls the New Mexico Supreme Court's opinion a "startling and massive exception in the heretofore unitary doctrine of Indian tribal sovereign immunity". (Petition at 4). However, such is not the case: Neither does the New Mexico decision have that effect nor is the doctrine of Indian sovereign immunity as single-minded as Acoma asserts. The New Mexico Supreme Court's holding is quite narrow and only serves to subject Indian tribes to state court jurisdiction when the tribe is doing business beyond its reservation boundaries with the authorization and approval of the state just as any other person, firm or entity.

A. The New Mexico Supreme Court's Decision Is Not In Conflict With The Parameters Of Indian Sovereign Immunity Established By This And Other Courts

The first point raised in Acoma's petition is that the New Mexico Supreme Court's decision is in conflict with decisions of this Court and other federal and state courts with respect to tribal sovereign immunity. Such is not the case. None of the authorities relied upon by Acoma deal with the narrow, precise holding of the New Mexico Supreme Court.

In *Puyallup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165 (1977) (*Puyallup III*), the precise ruling of this Court was that, while individual members of the Tribe are amenable to its process, the Washington state court could not fashion an order directed against the Tribe, itself, which: 1) restricted the number of

steelhead trout that all members of the Tribe may catch; 2) ordered the Tribe to identify its members engaged in steelhead fishing; and, 3) ordered the Tribe to report on the weekly steelhead catch by all of its members. The thrust of *Puyallup III* was to distinguish between state court jurisdiction over individual Tribe members versus the Tribe, itself, with respect to *fishing rights*. *Puyallup III* did not address the issue of whether the Tribe, itself, would be subject to state court jurisdiction for commercial fishing activities carried on outside its territorial boundaries.

Likewise, *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940), is inapposite. That case dealt with the validity of a Missouri judgment against the United States, acting as trustee for certain Indian lands, which arose out of reorganization proceedings concerning the lessee of said lands. The precise issue was whether the Missouri judgment was a bar to a later suit by the United States against the lessee's surety. The Court's opinion is somewhat confusing as to whether the immune sovereign was the United States or the Indian nations. And the Court implied that the judgment against the Indian nations was defective solely because it was rendered by an inappropriate court—not because the Indians possessed absolute immunity. 309 U.S. at 512.

Acoma's continued reliance throughout these proceedings on *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), is wholly misplaced. In that case, a female member of the Tribe and her daughter brought suit in federal court seeking declaratory relief under the Indian Civil Rights Act of 1968. The mother and her daughter sought to pre-

vent enforcement of a tribal ordinance which denied membership in the Tribe to female members who marry outside the Tribe. Despite some sweeping statements about Indian sovereign immunity, the precise issues decided by the Court concerned application of the Act to the facts presented and the competing purposes of the ICRA to protect the rights of individual Tribe members and yet promote the policy of furthering Indian self-government. 436 U.S. at 62. This case had nothing to do with commercial activities by Indians—individually or as a tribe, on the reservation or off.

The broad language about Indian sovereign immunity in *United States v. Wheeler*, 435 U.S. 313 (1978) is also inappropriately relied upon by Acoma. *Wheeler* narrowly held that a criminal offender who was convicted of a lesser, included offense in a tribal court could not avail himself of the Double Jeopardy Clause when charged with the more serious crimes in federal court because tribal and federal prosecutions are by separate sovereigns.

Other decisions relied upon by Acoma are simply not in conflict with the decision of the New Mexico Supreme Court at issue here. For example, *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986) addressed Indian sovereign immunity in the context of one Indian tribe's immunity from a crossclaim by another tribe where both tribes were parties defendant in a federal district court action.

None of these authorities relied on by Acoma deal with the issue of commercial activities by Indians outside their reservation boundaries. In each of these cases, the Court has been called upon to examine questions about the rights of Indians to govern themselves, make their

own policies, or conduct their own internal affairs. See, e.g., *Fisher v. District Court*, 424 U.S. 382 (1976); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). These types of questions are simply not at issue in the instant case.

B. Decisions Upholding Tribal Sovereign Immunity With Respect To Commercial Activities Are Confined To Immunizing Indians Against Claims Arising Out Of Activities Conducted Solely Upon Their Reservation Lands

When addressing issues concerning commercial activities by Indians, this Court's adherence to a policy of "plenary sovereign immunity from suit in *all courts*" (Petition at 4) has been significantly less than Acoma urges. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court considered whether activities conducted by an Indian tribe on lands adjacent to its reservation were subject to New Mexico gross receipts and compensating tax. Mr. Justice White's preferatory remarks in *Mescalero Apache Tribe* are especially applicable to the issue at hand:

> [E]ven on reservations state laws may be applied unless such application would interfere with reservation self government or would impair a right granted or reserved by federal law. [Citations omitted]
>
> * * *
>
> But tribal activities conducted outside the reservation present different considerations. 'State authority is yet more extensive over activities . . . not on any reservation.' [Citation omitted] Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. [Citations omitted]

411 U.S. at 148. The Court held that the Mescalero Tribe, itself, was subject to New Mexico gross receipts tax for its off reservation activities.

Acoma places great reliance upon *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982). Ramey involved a claim by the general contractor over construction of a resort hotel within and upon the Mescalero Tribe's reservation. Of note is what *Ramey* was *not* about: It was not about an Indian Tribe authorized to do business in the State of New Mexico and actually doing business outside of its reservation lands.

Likewise, *Williams v. Lee*, 358 U.S. 217 (1959), dealt with commercial activities by Indians *on their reservation*. In *Williams*, a vendor operating on the Navajo reservation brought suit in Arizona state court to collect for goods sold to Indians on the reservation. In reversing the state court's judgment in favor of the vendor, this Court said:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. *He was on the reservation and the transaction with an Indian took place there.* [Emphasis added]

358 U.S. at 223.

In the recent decision of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987), the Court held that a state could not regulate tribal commercial activities (gambling) on the reservation. *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987) also

dealt with tribal immunity for activities conducted upon the reservation (oil and gas leases). And, *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985) concerned the validity of California's cigarette tax as applied to cigarettes sold by the Tribe on its reservation. *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979) held that the Tribe's sovereign immunity prohibited state game wardens from entering upon the reservation to enforce state game and fish laws against non-Indians.

II. THE TREND OF THIS COURT AND OF CONGRESS HAS BEEN TO ALLOW STATE COURT JURISDICTION OVER INDIAN ACTIVITIES OF THE NATURE AT ISSUE HERE

Both this Court and Congress have, in more recent times, moved away from the "unlimited, federal-like nature of tribal immunity" (Petition at 9) asserted by Acoma.

> Our cases reveal a 'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal preemption'. [Citations omitted]

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 884 (1986).

Beginning with the Indian Reorganization Act of 1934, 25 U.S.C., Section 476, 477 (printed in Acoma's Petition as Appendix 6), Congress has, likewise, evinced a continuing policy toward greater Indian autonomy and concurrent responsibility for their own affairs. "The intent and purpose of the Reorganization Act was to rehabilitate the Indian's economic life and give him a chance to develop

the initiative destroyed by a century of oppression and paternalism." *Mescalero Tribe v. Jones*, 411 U.S. at 152.

Congress followed the Reorganization Act with the Act of August 15, 1953, 67 Stat. 588, 28 U.S.C., Section 1360, commonly known as Pub. L. 280 (printed in Acoma's Petition as Appendix 7). Although neither the State of New Mexico nor Acoma has availed itself of the procedures set forth in Pub. L. 280 whereby the State may assume jurisdiction over matters involving Indians, Congressional intent to relinquish federal control over Indians is clear.

Acoma argues that Pub. L. 280, while conferring state jurisdiction over Indian matters, exempts the tribal government, itself, (Petition at 21). This argument ignores Acoma's decision to act as a person, firm or entity and participate in commercial activities—for its own pecuniary gain—outside the confines of its reservation boundaries and beyond its function as a mere body politic.

III. BECAUSE ACOMA'S CONDUCT AT ISSUE DOES NOT CONCERN ITS PREROGATIVES OF SELF GOVERNMENT OR REGULATION OF ITS INTERNAL AFFAIRS, THE QUESTION OF IMMUNITY FOR CLAIMS ARISING OUT OF THAT CONDUCT SHOULD BE TESTED AGAINST TRADITIONAL NOTIONS OF FUNDAMENTAL FAIRNESS

Unlike the facts in many of the cases relied upon by Acoma, the instant action does not present a situation where one sovereign—the State of New Mexico—is attempting to exert its authority (such as regulation of internal activities) over another sovereign—the Pueblo of Acoma.

Acoma was hardly coerced into obtaining a general contractor's license, registering to do business with the State, or engaging in commercial activities beyond the boundaries of its reservation. By choosing to avail itself of the opportunities for pecuniary gain made available to it and fostered by the State of New Mexico, Acoma's conduct should be tested according to traditional notions of fair play and substantial justice.

A. Acoma's Amenability To Suit In State Courts For Its Off-Reservation, Commercial Activities Should Be Analyzed In Terms Of Established Principles For Testing Personal Jurisdiction

The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign. *Nevada v. Hall*, 400 U.S. 410, 414 (1979). The instant case obviously deals with the latter concept expressed by Mr. Justice Stevens. The difficulty in determining the nature of Indian sovereignty is that while Indian tribes have been traditionally afforded status as separate nations or entities having some degree of sovereignty, they have also been considered dependent wards of the government. *Colliflower v. Garland*, 342 F.2d 369, 374 (9th Cir. 1965). Indian tribes are not states; they have a status higher than that of states. *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). Yet, Indian tribes are also considered dependent and subordinate nations. *Id.*

Padilla does not here contend—nor, as Acoma argues, did the New Mexico Supreme Court hold—that Indian im-

munity in state courts should be abolished. The geographical, political and economic circumstances of Indian nations mandates that they be afforded some degree of protection by the federal government and immunity from state court jurisdiction—in circumstances where exercise of that jurisdiction would undermine an Indian tribe's political or economic autonomy.

But, where those considerations do not apply, and where a tribe voluntarily chooses to go beyond its geographical or political boundaries and conduct its commercial activities within the territory of another sovereign, then its immunity should be tested in accordance with traditional principles for determining the propriety of personal jurisdiction.

Thus, persuasive on the instant issue is the Foreign Sovereign Immunities Act of 1976, 28 U.S.C., Sections 1602, *et seq.* Section 1604 of that Act preserves the immunity of a foreign state to jurisdiction of the courts of the United States and of the States except as provided in Section 1605. Section 1605 provides an exception to such immunity where the action is based upon a commercial activity carried on in the United States by the foreign state.

As discussed in *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979), the exceptions to immunity set forth in the Act embody this Court's line of decisions which have established that the question of a court's jurisdiction over a person, firm or entity outside the forum's territorial boundaries is answered by looking at the outsider's contacts with the forum state. The analysis is one of personal jurisdiction in its typical application even though the foreigner is, itself, a sovereign.

The situation presented in *Nevada v. Hall, supra,* was not unlike the situation at hand in that one sovereign elected to conduct its activities within the territory of another. This Court held that not only was Nevada amenable to suit in California state court, it was subject to application of California law—not Nevada law—in that court.

In the instant case, Padilla does not attempt to interfere with Acoma's internal political processes, regulation of its affairs, preservation of its cultural traditions or protection of its economic resources. Nor will allowing Padilla's suit to proceed in state court have that effect. To simply say that Acoma is immune from suit in all instances solely because it is an Indian tribe is incorrect, is grossly unfair and does a disservice to Acoma (and all other tribes of Indians) itself.

The grave problems of economic disparity and unemployment which face many Indian tribes today will not be alleviated as long as a tribe is able to hide behind the shield of sovereign immunity for disputes arising out of its off-reservation commercial activities. In such a situation, every outsider is discouraged from doing business with a tribe.

B. By Filing A Counterclaim Against Padilla, Acoma Has Consented To The Jurisdiction Of The New Mexico State Court And Has Waived Its Claim Of Immunity

By filing a counterclaim against Padilla, Acoma has invoked the jurisdiction of the New Mexico state court to obtain affirmative relief. By so doing, Acoma has consented to that court's jurisdiction and has waived its claim of sovereign immunity.

In *United States v. State of Oregon*, 657 F.2d 1009 (9th Cir. 1981), the Yakima Tribe intervened as a party plaintiff in a suit brought by the United States concerning state regulation of fishing activities—including such activities within the Tribe's reservation boundaries. The Tribe contended, *inter alia*, that it was immune from suit and that the state court lacked subject matter jurisdiction to enter an injunction against it. 657 F.2d at 1012.

Citing similar precedent in other circuits, the Ninth Circuit held that Indian Tribes may consent to suit without explicit Congressional authority. *Id.* at 1013. The court found that by intervening, the Yakima Tribe had consented to complete adjudication by the forum court. *Id.* at 1014. Intervention as a party was also held to be an express waiver of a tribe's sovereign immunity in *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986).

While Acoma is here, not an intervenor, the effect is the same: Acoma asks the state court to adjudicate its dispute and provide it with relief. In its counterclaim, Acoma attempts to somehow bifurcate the general jurisdiction of the New Mexico state district court. Acoma says (Appendix 2, "Counterclaim"; Paragraph 1):

> The Pueblo of Acoma, a federally recognized Indian nation, is able to use state courts to enforce contract obligations. The jurisdictional basis for this counterclaim is separate and distinct from the Complaint [filed] in this case.

Such an assertion is ridiculous. If Acoma wishes to utilize New Mexico state courts to enforce its contracts arising out of Acoma's off reservation activities, then

Acoma must be held amenable to suit in those very courts by the other parties to such contracts. Notwithstanding its assertions to the contrary, by filing a counterclaim against Padilla, Acoma has waived its claim of sovereign immunity and has consented to the jurisdiction of the New Mexico courts.

—o—

CONCLUSION

The decision of the New Mexico Supreme Court holding Acoma amenable to suit in state court for claims arising out of Acoma's off-reservation, commerical activities is not in conflict with the parameters of Indian sovereign immunity established by this Court. Indeed, that decision is in accordance with the trend of Congress and the Court toward more autonomy for Indians. Acoma's amenability to suit in the courts of another sovereign should be tested according to traditional principles of personal jurisdiction. And, having invoked the jurisdiction of the New Mexico court, Acoma should be held to have waived its claim of sovereign immunity. For these reasons, Acoma's petition for writ of certiorari should be denied.

Respectfully submitted this 31st day of October, 1988,

/s/ Richard V. Earl
Richard V. Earl
407 Seventh St. N.W.
Albuquerque, NM 87102
(505) 242-9060

Attorneys for Respondent

APPENDIX 1

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO
FRANK PADILLA,

Plaintiff,

vs. No. CV 86 01292

PUEBLO OF ACOMA d/b/a
SKY CITY CONTRACTORS,

Defendant.

COMPLAINT FOR BREACH OF CONTRACT AND FRAUD

(Filed February 18, 1986)

Plaintiff, Frank Padilla, by and through his attorneys, GRISHAM & LAWLESS (Richard V. Earl), as claims for relief against Defendant, Pueblo of Acoma d/b/a Sky City Contractors, alleges and states:

COUNT I

1. Plaintiff is a resident ot Bernalillo County, State of New Mexico, and has been during all times relevant herein.

2. Upon information and belief, Defendant is an unincorporated associated registered and authorized to do business in the State of New Mexico, and actually doing so, with its principal place of business in Cibola County, State of New Mexico.

3. On or about April 1, 1985, the parties entered into a written agreement whereby Plaintiff would render roofing consultation and supervisory services to Defen-

dant at "Los Cerritos" in consideration for payment of $6,850.00. Said written agreement was confirmed by Plaintiff's invoice to Defendant and by Defendant's purchase order to Plaintiff—all of which are attached hereto as Exhibit "A".

4. On or about May 1, 1985, the parties entered into another written agreement whereby Plaintiff would render roofing consultation and supervisory services to Defendant at "Beaverhead" in consideration for payment of $1,800.00. Said written agreement was confirmed by Plaintiff's invoice to Defendant and by Defendant's purchase order to Plaintiff—all of which are attached hereto as Exhibit "B".

5. Plaintiff performed all obligations required of him under said agreements in a timely, professional and good workmanlike manner and without objection or complaint by Defendant.

6. Plaintiff has made demand to Defendant for payment for said performance as provided in said contracts, but Defendant has failed and refused to pay.

7. As a direct and proximate result of Defendant's failure and refusal to pay for Plaintiff's services as agreed, Plaintiff has suffered damages in the amount of $8,650.00.

8. As a further result of Defendant's failure and refusal to pay for Plaintiff's services as agreed, Plaintiff has suffered incidental and consequential damages in the form of attorney's fees and costs of litigation—and such damages were foreseeable at the time the parties entered into said agreement.

9. Plaintiff's complaint herein states a claim for a sum certain due on a date certain, for which Plaintiff is entitled to prejudgment interest.

WHEREFORE, Plaintiff prays for judgment against Defendant in the amount of $8,650.00 in compensatory damages, plus Plaintiff's incidental and consequential damages and prejudgment interest in amounts to be determined at trial, plus Plaintiff's costs herein and such other and further relief as the Court may deem just and proper.

COUNT II

1. Plaintiff restates the allegations contained in Count I of this Complaint as if fully set forth.

2. At the time the parties entered into the agreement attached hereto as Exhibit "A" and "B", Defendant stated and represented to Plaintiff that Plaintiff would be compensated for services rendered under said contracts as set forth therein.

3. Said statements and representations were made by Defendant with the intent that Plaintiff rely thereon and to induce to Plaintiff to enter into said agreements and perform the services as set forth therein.

4. Plaintiff relied on said statements and representations of Defendant and thereby was induced into entering into said agreements and performing the services thereunder.

5. Plaintiff's reliance on said statements and inducement to enter into said agreements and perform thereunder was reasonable.

6. By purchase order dated June 20, 1985, (a copy of which is attached hereto as part of Exhibit "A"), Defendant stated and acknowledged that it owed Plaintiff $6,850.00.

7. Additionally, by memorandum dated August 13, 1985, Defendant stated and acknowledged to Plaintiff that payment would be made for services rendered—a copy of which memorandum is attached hereto as Exhibit "C".

8. By purchase order dated September 9, 1985 (a copy of which is attached hereto as Exhibit "B"), Defendant stated and acknowledged that it owed Plaintiff $1,800.00.

9. Subsequent to said purchase orders and memorandum, Plaintiff has made numerous demands upon Defendant for payment of amounts due under said agreements, but Defendant has failed and refused to pay or to acknowledge Plaintiff's demands.

10. At the time the parties entered into said agreements, it was Defendant's intent not to pay Plaintiff for services rendered under said agreements.

11. At the time the parties entered into said agreements, Defendant knew or reasonably should have known that its statements and representations to Plaintiff were false and fraudulent in that Defendant never intended to honor its promises under said agreements or to pay Plaintiff for Plaintiff's services rendered.

12. As a direct and proximate result of Defendant's false and fraudulent statements and representations, Plaintiff has suffered actual damages as set forth in Count I of this Complaint.

13. As a further result of Defendant's intentionally false and fraudulent statements and representations and intentional refusal to honor its promises to Plaintiff, Plaintiff is entitled to recover punitive damages in the amount of $10,000.00.

WHEREFORE, Plaintiff prays for judgment against Defendant for compensatory, incidental and consequential damages, plus prejudgment interest—all as set forth in Count I of this Complaint—plus punitive damages in the amount of $10,000.00, plus Plaintiff's costs herein and such other and further relief as the Court may deem just and proper.

GRISHAM & LAWLESS

By: /s/ Richard V. Earl
Richard V. Earl
600 Central S.W., Suite 100
Albuquerque, New Mexico
87102
(505) 247-1401

EXHIBIT "A"

PROPOSAL and CONTRACT

Date March 12, 1985

TO Sky City Contractors Pueblo of Acoma
PO Box 349 Acomita, New Mexico

Dear Sir:

I propose to furnish all materials and perform all labor necessary to complete the following: Supervision of labor crew furnished by Sky City Contractors and equipment to install built up roofing materials on Superette Laundromat at project located at Los Cerritos.

All of the above work to be completed in a substantial and workmanlike manner according to standard practices for the sum of Six Thousand Eight Hundred and Fifty Dollars ($6850.00).

Payments to be made in full upon completion of contract ..... as the work progresses to the value of ..... per cent (.....%) of all work completed. The entire amount of contract to be paid within ..... days after completion.

Any alteration or deviation from the above specifications involving extra cost of material or labor will only be executed upon written orders for same, and will become an extra charge over the sum mentioned in this contract. All agreements must be made in writing.

Respectfully submitted,
By /s/ Frank R. Padilla

ACCEPTANCE

You are hereby authorized to furnish ..... required to complete the work mentioned in the above proposal, for which ..... agree to pay the amount mentioned in said proposal, and according to the terms thereof.

/s/ Sky City Contractors

ACCEPTED
/s/ Gene Hart
Date April 1, 1985
#0978 6/20/85

INVOICE 1740

June 3, 1985

SOLD TO Sky Cty Contractors
PO Box 349
Acomita, New Mexico

SHIPPED TO .....

"for provision of supervision and equipment to install built up roofing on Superette/laundromat at Los Cerritos" $6850.00

/s/ Frank Padilla
ORIGINAL

Purchase Order No. 0978
Invoice, Correspondence, Shipping Paper and all Packages Must Reference P.O. No.
Date June 20, 1985

Send Invoices To
Pueblo of Acoma, dba
SKY CITY CONTRACTORS
P.O. Box 349
Pueblo of Acoma, N.M. 87034
(505) 552-6658

Vendor

Frank Padilla
4100 Wallace, S.E.
Albuq., NM 87102

Ship to

Description	Total Amount
For provision of supervision and equipment to install built up roofing on Superette/Laundromat at Los Cerritos.	$6,850.00

INV# 1740 (6/03/85)

Tax Status: ☐ Taxable
☐ Tax Exempt-No. .....

Actual Total Cost $6,850.00
Requestor: Jackie Torino
Approved by: Gene Hart

For Office Use Only
Project: Superette

Division: Building
Line Item: Subcontract
Account Code: 5B-721
Other:

Title:
General Superintendent
Date: June 20, 1985

EXHIBIT "B"

PROPOSAL and CONTRACT

Date May 1, 1985

TO SKY CITY CONTRACTORS

Dear Sir:

I propose to furnish supervision necessary to complete the following: Complete metal roof installation on all contracted buildings at Beaverhead for Gila National Forest.

All of the above work to be completed in a substantial and workmanlike manner according to standard practices for the sum of $15.00 per hour Dollars ($1800.00)

Payments to be made 120 hours. Amount to be paid upon completion of contract.

_____ as the work progresses to the value of ____ per cent (____%) of all work completed. The entire amount of contract to be paid within ____ days after completion.

Any alteration or deviation from the above specifications involving extra cost of material or labor will only be executed upon written orders for same, and will be-

come an extra charge over the sum mentioned in this contract. All agreements must be made in writing.

Address 4100 Wallace, S.E. ALB

Phone 873-0402

Respectfully submitted,

By /s/ Frank Padilla

ACCEPTANCE

You are hereby authorized to furnish supervision required to complete the work mentioned in the above proposal, for which Sky City Cont. agree to pay the amount mentioned in said proposal, and according to the terms thereof.

/s/ Sky City Contractors

ACCEPTED

/s/ Gene Hart

Date May 1, 1985

NOTICE TO OWNER

"Under the Mechanics' Lien Law, any contractor, subcontractor, laborer, materialman or other person who helps to improve your property and is not paid for his labor, services or material, has a right to enforce his claim against your property.

"Under the law, you may protect yourself against such claims by filing, before commencing such work or improvement, an original contract for the work of improvement or a modification thereof, in the office of the county recorder of the county where the property is situated and requiring that a contractor's payment bond be recorded in such office. Said bond shall be in an amount not less than fifty percent (50%) of the contract price and shall, in addition to any conditions for the performance of the contract, be conditioned for the payment in full of the claims of all persons furnishing labor, services, equipment or materials for the work described in said contract.

INVOICE

Invoice No. 1209461

Sold To	Shipped To
Sky City Contractors	Frank Padilla
Street & No.	Street & No.
PO Box 349	4100 Wallace, S.E.
City	City
Pueblo of Acoma	Albuq.
N.M. 87034	NM 87102
State Zip	State Zip

Date 5-17-85

CUSTOMER'S ORDER SALESMAN TERMS F.O.B.

For supervision of crew installing metal roofing of Beaverhead Gila National Forest

$15.00 Per Hour
x
120 Hours
$1800.00
= = = =

Purchase Order No. 1081
Invoice, Correspondence, Shipping
Paper and all Packages must reference
P.O. No.

Date September 9, 1985

Send Invoices To
Pueblo of Acoma, dba
SKY CITY CONTRACTORS
P.O. Box 349
Pueblo of Acoma, N.M. 87034
(505) 552-6658

Vendor	Ship To
Frank Padilla	.....
4100 Wallase SE	.....
Albuquerque, NM 87102	.....

Description	Total Amount
For supervision of crew installing metal roofing at Beaverhead Gila National Forest.	
$15.00/per hour x 120/hours	1,800.00

ACTUAL TOTAL COST $1,800.00

Tax Status: ☐ Taxable
☐ Tax Exempt-No. .....

For Office Use Only
Project/ Beaverhead
Division: Building
Line Item: Sub-Contract
Account Code: 5B-721
Other:

Requestor: Jackie Torino
Approved by: Harry Acencio
Title: Harry Ascencio, Lt. Governor
Date: 9/09/85

RP 0012

EXHIBIT "C"

SKY CITY CONTRACTORS
P.O. BO X349
ACOMA, N.M. 87034

8/13/85

Frank,

These are your copies.

Another contractor will finish the project so they might be in touch with you if needed.

Payment will be made After 8/19/85. The new contractor is getting familiar with the company and will start making payments next week. Thank you for the service. JT

Certified as a True and Correct Copy of the Original filed in my office. Thomas J. Ruiz, Clerk of the District Court

By: Victoria M. Trujillo, Deputy Date 10/25/85

APPENDIX 2

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

FRANK PADILLA,

Plaintiff,

v. No. CV-86-01292

PUEBLO OF ACOMA, d/b/a
SKY CITY CONTRACTORS,

Defendants.

ANSWER TO COMPLAINT FOR BREACH OF CONTRACT and FRAUD and COUNTERCLAIM

(Filed Sep. 16, 1988)

Defendant PUEBLO OF ACOMA represented by Peter C. Chestnut, as answer to the Complaint in this action:

COUNT ONE

1. Admits the allegations contained in paragraph 1.

2. Denies the allegations contained in paragraph 2 and further states that the Pueblo of Acoma is a federally recognized Indian Tribe.

3. Admits the allegations contained in paragraph 3.

4. Admits the allegations contained in paragraph 4.

5. Denies the allegations contained in paragraph 5.

6. Denies the allegations made in paragraph 6 and further states that the Pueblo of Acoma paid $1,800 (One

Thousand Eight Hundred Dollars) to Plaintiff for the services described in paragraph 4 of the Complaint, and that the agreement described in paragraph 4 has been paid for in full.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8.

9. Denies the allegations contained in paragraph 9.

COUNT TWO

1. Defendant restates the answers to allegations contained in Count One of this Answer as if fully set forth here.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Is without information sufficient to formally believe to the truth or falsity of allegations contained in paragraph 4, and therefore denies them.

5. Admits the allegations contained in paragraph 5, without admitting that Plaintiff in fact relied on statements and inducements of the Defendant.

6. Denies the allegations contained in paragraph 6.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, and further states that Defendant paid Plaintiff $1,800 (One Thousand Eight Hundred Dollars) in full satisfaction of this portion of Plaintiff's claim.

9. Admits the allegations of paragraph 9, except it denies that it refused to pay the $1,800 (One Thousand Eight Hundred Dollars) claim.

10. Denies the allegations contained in paragraph 10.

11. Denies the allegations contained in paragraph 11.

12. Denies the allegations contained in paragraph 12.

13. Denies the allegations contained in paragraph 13.

FIRST DEFENSE

This Court lacks jurisdiction over the person of the Defendant Pueblo of Acoma, an Indian Tribe doing business on a portion of its own land, namely the "Los Cerritos" tract.

SECOND DEFENSE

Service of process on the Pueblo of Acoma, a federally recognized Indian Tribe, was defective so that this Court lacks personal jurisdiction over the Pueblo.

THIRD DEFENSE

The proper forum for this action is the Tribal Court of the Pueblo of Acoma.

FOURTH DEFENSE

Plaintiff and Defendant have reached an accord and satisfaction on the $1,800 (One Thousand Eight Hundred Dollar) claim described in Exhibit B of the Complaint.

FIFTH DEFENSE

This Court lacks jurisdiction over the subject matter of this action, namely a commercial dispute arising from commercial activity involving a federally recognized Indian Tribe on land owned by the Pueblo immediately adjacent to its reservation lands.

SIXTH DEFENSE

Defendant Pueblo of Acoma has not waived its sovereign immunity.

SEVENTH DEFENSE

Plaintiff failed to provide services in a workmanlike manner.

EIGHTH DEFENSE

The subject matter of this action involves an Indian Tribe, arose on tribal lands, and should be heard in Tribal Court as a matter of comity.

NINTH DEFENSE

Defendant Pueblo of Acoma, as a sovereign Indian nation, is immune from suit because the Congress of the United States has not consented to this suit.

TENTH DEFENSE

The contract being sued upon is null and void and unenforceable because it violates one or more of the federal statutes, including but not limited to those codified at 28 U.S.C.A. 1360, 25 U.S.C. 229, 25 U.S.C.A. 81, 25 U.S.C.A. 476-477, 25 U.S.C.A. §§ 450a-450n.

COUNTERCLAIM

1. The Pueblo of Acoma, a federally recognized Indian nation, is able to use state courts to enforce contract obligations. The jurisdictional basis for this counterclaim is separate and distinct from the Complaint filed in this case.

2. The Pueblo contracted with Mr. Padilla to provide roofing services on a building owned by the Pueblo located on tribal land next to the Acoma Pueblo Grant boundary. The terms of that agreement are set out in Exhibit A to the Complaint filed by Padilla. The Pueblo offered to pay Padilla $6,850 to supervise and be responsible for installation of a new roof on the Acoma Superette Building on the Pueblo's Los Cerritos property.

3. Padilla agreed to do the work but failed to provide a commercially reasonable result, i.e., a new roof done right.

4. As a result, the Pueblo had to hire another roofer to redo the job. The Pueblo suffered damages in an amount to be proved at trial.

WHEREFORE, Counterclaimant Pueblo of Acoma prays:

1. For judgment against Padilla in an amount to be proved at trial, being the difference between either the value of services actually provided by Padilla of the contract price, whichever is less, and the amount paid by the Pueblo to install a new roof properly:

2. Its costs, including a reasonable attorney's fee; and

3. Such other relief as seem just to the Court.

/s/ Peter C. Chestnut
PETER C. CHESTNUT
Attorney for Defendant
Pueblo de Acoma
620 Roma, N.W., #D
Albuquerque, NM 87102
(505) 842-5864

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing pleading was hand-delivered to opposing counsel of record, Richard V. Earl, this 16 day of September. 1988.

/s/ P. Chestnut

CERTIFIED AS A TRUE AND CORRECT COPY
OF THE ORIGINAL FILED IN MY OFFICE.
THOMAS J. RUIZ, Clerk of the District Court
By /s/ Victoria M. Trujillo, Deputy
Date: 10/25/88

OPINION

SUPREME COURT OF THE UNITED STATES

PUEBLO OF ACOMA *v.* PADILLA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 88-415. Decided April 17, 1989

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Respondent Frank Padilla, a roofing consultant, filed suit in New Mexico state court alleging a breach of contract by petitioner Pueblo of Acoma, doing business as Sky City Contractors. Petitioner had hired respondent to supervise Sky City's installation of roofs on two building projects located off the Acoma Indian Reservation. The New Mexico Supreme Court held that petitioner was not protected from suit by tribal sovereign immunity. According to the New Mexico Court, a State's "exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." App. to Pet for Cert. 10 (citing *Nevada* v. *Hall*, 440 U. S. 410 (1979)). Because the State of New Mexico allows breach of contract actions to be brought against itself, the Court reasoned, such actions were allowable against Indian tribes as well.

This decision conflicts with decisions of the Arizona courts applying tribal sovereign immunity to off-reservation activities. In *Morgan* v. *Colorado River Indian Tribe*, 103 Ariz. 425, 427-428, 443 P. 2d 421, 423-424 (1968), the Arizona Supreme Court held that the Colorado River Indian Tribe was immune from suit for an accident at the Blue Water Marina Park, a tribal enterprise located outside the boundaries of its reservation. The Court did not treat the question as one of comity; indeed, the Court noted that under identical circumstances the State of Arizona would be liable. *Id.*, at 428, n. 1, 443 P. 2d, at 424, n. 1. See also *S. Unique, Ltd.* v.

Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 380–381, 674 P. 2d 1376, 1378–1379 (App. 1983) (breach of contract action arising out of business transaction initiated off reservation). The doctrine of tribal sovereign immunity, as applied by the Arizona courts, extends not only to an Indian tribe but also to a "subordinate economic organization" of the tribe. *White Mountain Apache Indian Tribe* v. *Shelley*, 107 Ariz. 4, 6–7, 480 P. 2d 654, 656–657 (1971); *Smith Plumbing Co.* v. *Aetna Casualty & Surety Co.*, 149 Ariz. 524, 532, 720 P. 2d 499, 507, cert. denied, 479 U. S. 987 (1986). The New Mexico Supreme Court expressly recognized that Sky City Contractors was a subordinate economic organization of petitioner, App. to Pet. for Cert. 8 (citing *White Mountain Apache*, *supra*), yet nevertheless held that it was not immune from suit.

An opportunity to resolve this conflict was presented by our grant of certiorari in *Oklahoma Tax Comm'n* v. *Graham*, —— U. S. —— (1988), although we ultimately decided the case on other grounds. In that case, two questions were before us: whether the case had been properly removed to federal court and whether tribal sovereign immunity barred an action to collect taxes "on commercial activities conducted by an Indian tribe on off-reservation lands." We held that the case had not been properly removed, —— U. S. —— (1989) (per curiam), and as a result did not need to reach the sovereign immunity question. The present case provides an opportunity to resolve the issue we did not reach in *Graham* and thereby to resolve the conflict among the state courts.

I would grant the petition for certiorari and resolve the question on which we previously granted certiorari but did not decide.

JUSTICE KENNEDY took no part in the consideration or decision of this petition.